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A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1776 — 1850

BY FRANCIS NEWTON THORPE

Illustrated with Maps

IN TWO VOLUMES

VOLUME TWO

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A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE

CHAPTER I

DEMOCRACY IN A BORDER STATE: 1849—KENTUCKY

JUST as the half-century was closing, the people of Kentucky made a new constitution. The convention, consisting of a hundred delegates, assembled at Frankfort on the 1st of October.* Of these, the majority were natives of the State, and all but three of slave-holding States. The difference, in many respects the most important, between the democracy in a Northern and that in a Southern State was illustrated in the record the delegates gave of their places of nativity. Had the convention met in New England, New York, or New Jersey, in Michigan, Wisconsin, or Iowa,

* The principal authorities for this chapter are: The Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky, 1849; 1168 pp., 8vo; Frankfort, Kentucky, 1849: the Journal and Proceedings of the Convention of the State of Kentucky; 531 pp., 8vo; Frankfort, Kentucky, 1849: and the laws of Kentucky, 1792–1850.

the delegate would have given the name of his native town; here, in Kentucky — and it would have been the same elsewhere in the South—he gave that of his native county. This difference may be said to distinguish the civil institutions of the two portions of the Union: the county constituting the political unit in the South; the town, or township, constituting it in the North.

At this time the people of the State demanded two reforms in its plan of government — the reorganization of the judiciary and legislative control of slavery. The question of suffrage extension had been raised as one demanding solution; but Kentucky, like other slave-holding commonwealths, was conservative, and was not bidding for a foreign population. Yet not all the members were unwilling to extend the right to vote; some declared themselves willing to adopt the principle of the federal Constitution, and make no distinction between the native-born and the naturalized citizen. On the 6th of October it was proposed to limit citizenship to free white males and to reapportion representation so as to include fractions of the population by joining counties in such a way that equality of representation would be secured by additional members in the one House or in the other. It was also proposed to continue the old limitation by which clergymen and religious teachers were made ineligible to the General Assembly—a proposition which, a few days later, led to an exhaustive discussion—the only one on this subject in a constitutional convention that has been reported.

Two days later the president announced the standing committees, and their titles suggest the character of the measures which engaged the attention of a constitutional convention in a Southern State at this time. The committees were on the Executive for the State at large, and on Executive and Administerial Offices for Counties and Districts; on the Militia, on the Legislative Departments, on the Court of Appeals, on Circuit Courts, on County Courts, on Miscellaneous Provisions, on Constitutional Revision and Slavery, and on Education. On this day also several resolutions were made which showed the state of public opinion. The Legislature ought not to meet oftener than once in three years, nor continue in session longer than fifty days without reducing the pay of its members to a dollar a day.* Instead of the existing system of appointing justices of the peace, each county should be laid off in convenient magisterial districts, in each of which the electors should choose the justice, and he should be commissioned by the Governor. If the justice removed from his district, his office should thereby become vacant.† A new system of county

* Compare the action of the Michigan Convention of 1850, *infra*, pp. 221, 222, 283. Also Vol. ii., pp. 348–349.

† Compare with the Virginia constitution of 1850, Art. iv., Sec. 7: "The removal of any person elected to either branch of the General Assembly from the county, city, town, or district for which he was elected shall vacate his office." See the same principle in the Massachusetts constitution of 1780, Chap. i., Art. iii., Sec. 3: "Every member of the House of Representatives shall be chosen by written votes; and, for one year at least next preceding his election, shall have been an inhabitant of, and have been seized

courts should be organized. In another set of resolutions were propositions to limit the assembling of the Legislature to once in two years; to limit the length of the session by providing that no members should receive compensation for a session of more than sixty days; and that State and federal officers should be elected on the same day. It was also proposed, as was characteristic of the time, that all free persons of color ought to be removed from the State, and their immigration to Kentucky be prevented.

It soon appeared that there were three opinions in the convention respecting slavery. Some desired the unrestricted importation of slaves; others, a constitutional restriction on importation; a third class wished to hand the whole subject over to legislative control. It was soon apparent that any discussion of slavery would be a discussion of the rights of property, and that any amendment of the old constitution affecting slavery would be favored or opposed as it affected property rights. For this reason there was an unwillingness to give the control of slavery into the hands of the Legislature; only a sovereign convention should be intrusted with so important a charge.

in his own right of a freehold of the value of one hundred pounds within, the town he shall be chosen to represent, or any ratable estate to the value of two hundred pounds; and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid." Amended in 1857 (Art. xxi.), providing that if the Representative ceases to be an inhabitant of the Commonwealth, he shall cease to represent the district. Also see 122, Mass., 594-600.

On the 9th another amendment was proposed, characteristic of an effort, then becoming common in the country, to correct a grave abuse by limiting the debt-making powers of cities, towns, and counties. None in any manner should be allowed to give credit in aid of any individual, association, or corporation, or to contract debts the payment of which was not specifically provided for within a term of years. This was one of the earliest illustrations in this country of an effort to concentrate all power over local governments in the hands of the general government. In this case it was control by the general government of the State over local government in town, city, or county.

The Court of Appeals should have an appellate jurisdiction only, and co-extensive with the State; its judges should hold their office for eight years, and be subject to impeachment or removal by the Governor on the address of two-thirds of each House. It should consist of four judges, of whom three might constitute a quorum for the transaction of business. The State should be divided at the first session of the General Assembly into four appellate districts, in each of which the qualified voters should elect one judge—an innovation from the appointed judiciary of the State as organized in the eighteenth century. Nor should all the judges be elected for the full term at this first election. One should be chosen to serve for two years, one for four, one for six, and one for eight; the tenure to be determined by the judges

themselves, by lot, after the election. Vacancies in the court should be filled by a new election—another innovation from the eighteenth-century custom of appointment by the Governor.

A resolution introduced on the 10th suggested a reform then beginning to be demanded quite freely by the States, that the Legislature, every ten years, should appoint a commission, consisting of men learned in the law, to revise, arrange, and publish the laws, both civil and criminal, so as to have but one law on any one subject, and all "in plain English." At the same time it was proposed that every law enacted by the Legislature should henceforth embrace but one subject, expressed in its title. If a law were revised or amended, the change should be shown not merely by reference to its title, but by the re-enactment and publication of the old law at length, and of all laws which it repealed. Another evidence of change in public opinion since 1800 was shown by the resolution that, in case of the death, resignation, or inability of the Governor, the executive vacancy should be filled by a direct vote of the people, instead of by joint ballot of the Legislature.

The influence of slavery clauses in the constitutions of Georgia,* Alabama,† Mississippi,‡ Florida,§ and Missouri,‖ was shown in the proposi-

* Constitution of 1798, Art. iv., Sec. 11.
† Constitution of 1819, Art. vi. (Slaves).
‡ Constitution of 1817, Art. vi. (Slaves).
§ Constitution of 1838, Art. xvi., Sec. 2.
‖ Constitution of 1820, Art. iii., Sec. 26.

tion that immigrants to Kentucky should not be prevented from bringing their slaves with them so long as slavery existed in any one of the United States; and that the Legislature have no power to authorize the emancipation of any slave without providing that he be removed from Kentucky and never return.* But it should have full power to prevent slaves being brought into Kentucky as merchandise, and also to forbid bringing them from a foreign country; the latter provision being wholly unnecessary, as the importation of slaves was already forbidden by the act of Congress. The influence of Georgia,† Mississippi,‡ Alabama,§ and Arkansas‖ was further shown in the proposition that the Legislature should have full power to pass laws obliging the owners of slaves to abstain from all injuries to them extending to life and limb, and that in case of neglect to comply, the owners should suffer the loss of their slaves, who were to be sold, however, for their owners' benefit. If a slave were executed, a full equivalent in money should be paid the owner out of a fund raised by a tax on slaves levied for that purpose. If he were executed for the destruction of property, a *pro rata* distribution of the value

* Compare the constitution of Virginia of 1850, Art. iv., Sec. 19: "Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and shall be reduced to slavery, under such regulation as may be prescribed by law."

† 1798, Art. iv., Sec. 12.

‡ 1817, Art. vi.

§ 1819, Art. vi., Sec. 3.

‖ 1836, Art. vii. See also Texas constitution of 1845, Art. viii.

paid for the slave should be made between his owner and the owner of the property destroyed. In case a free negro entered the State and refused to leave it, he was to be deemed guilty of felony and be punished by confinement in the penitentiary. In the prosecution of slaves for felony, no inquest by a grand jury should be necessary, but the General Assembly should have no power to deprive a slave of the privilege of an impartial trial by a petit jury. Many of these propositions were only transcripts of existing laws.*

A proposition to deny to the Assembly the power to emancipate slaves without the consent of their owners, or to infringe the rights of creditors, and that emancipated slaves should be sent out of the United States at the expense of the emancipator, and, in case of their return to the State, be sold for its benefit, precipitated a debate on slavery on the 10th. The slave property in Kentucky was valued at sixty-one millions of dollars. It would cost fifty dollars apiece to remove the slaves to Africa. At this rate, as there were two hundred thousand slaves in the State, their emancipation would cost ten millions of dollars, the mere interest upon which sum, at current rates—four million two hundred thousand dollars—was too great to make it possible that any Assembly would levy it upon the people in the way of a tax, or with any prospect other than that the principal would be a perpetual debt. Thus the

* See Vol. i., Chap. xii.

emancipation of the negro would work the enslavement of the white race. Were not the slaves in Kentucky in a better condition than the laboring population in any other part of the globe? No two men of the whole country whose opinions were worthy of consideration could agree on a plan of emancipation? Public opinion had not supported the act of 1833,* prohibiting the importation of slaves. A similar act adopted in Virginia in 1777 had met the same fate. Free negroes were the most undesirable class of the population—a curse alike to the white and the black race.† They had not the white man's motive to elevate themselves and maintain a high standard of morality and education, and being excluded from office and all the privileges of political life, necessarily became a degraded race. Vicious, wicked white men utilized them for selfish purposes, so that it had been necessary to exclude the negro from being a witness. The profits arising from robberies committed by free negroes at the instigation of an evil-minded white man might be received by him, yet the free negro could not be a witness against him. Therefore, the free negro population should be exterminated from the commonwealth.‡

The slave property of the commonwealth produced less than three per cent. on the capital in-

* February 2d.

† See the constitution of Florida (1838–45), Art. xvi., Sec. 3; also Vol. i., Chap. xii.

‡ Compare the constitution of Virginia of 1850, Art. iv., Sec. 21.

vested, or about one-half as much as the moneyed capital of equal amount. Even if the profit netted three per cent., it was demonstrable that it was not to the interest of the State to increase this kind of capital. Of the two hundred thousand slaves in Kentucky, about three-fourths were superannuated and sick, women and infants unable to work—all of whom yielded no profit. On an estate having forty or fifty slaves, there were rarely more than ten who were available as laborers. According to this proportion, there were left fifty thousand laborers profitable for the State, and the value of their labor might be estimated at sixty dollars each, or, in the aggregate, a yearly product of three millions of dollars. But from this must be deducted at least twenty dollars apiece for food, raiment, lodging, and tax bills, leaving a profit of only two millions. There must also be deducted about five per cent. of the value of all slaves on account of death. For this reason it was against the interest of the commonwealth that slave property should increase. There could be no doubt that white labor was the cheaper, nor that it was to the interest of the people of Kentucky to sell their slaves. Had it not been that slave-owners were attached to their slaves, and disliked to see those who had grown up with them and their children driven into a more oppressive condition, there would have been far less difficulty in disposing of slave property and investing capital in some other way.

The institution was sustained in Kentucky

chiefly by the influence of those of its citizens who had worked their way up from small beginnings in order to gain social position for themselves and their families. Slaves kept out a pauper population, who, emptied from the jails and poor-houses of Europe and from other parts of the world, would otherwise come to the State and compete in labor with its whole population; but it should not be understood that many such immigrants actually came. The better class of immigrants came to Kentucky, leaving the dregs of this class to settle in Northern cities. What was the evidence that it was to the interest of the owners of slaves to dispose of that kind of property? Because slave labor was the dearer. Why should the boot and shoe dealers of Kentucky, in order to secure the commodities of their trade, go all the way to Lynn? Because the articles could be bought in Massachusetts, and, after expense of transportation, be sold in Kentucky, at less than one-third the cost at which they could be manufactured there. Was it not for the same reason that the citizens of Kentucky obtained their cotton and woollen fabrics more cheaply abroad than at home? Furniture and cabinet-work in Cincinnati could be transported one hundred and fifty miles into the interior of the State by way of the Kentucky River and be sold at one-third below the cost of manufacture there. The reason was that Kentucky was an agricultural, not a manufacturing, State. Was it not evident, then, that free labor was cheaper than slave, and that the

working portion of the community alone was interested in keeping up the institution of slavery? Every one knew that the institution was the best in the world for keeping society from becoming fixed and settled. This was attested by the history of the original overseers in Virginia and Kentucky, many of whom had become proprietors of the various estates upon which they were at first employed as overseers, and their descendants were now lawmakers and judges, while the descendants of the original proprietors had fallen in the scale of society. Such revolutions in the condition of individuals did not occur so frequently in a country where the institution of slavery did not exist. In New York and in Massachusetts there might be found many estates which for many generations descended from sire to son, while the offspring of the poor laborer was a poor laborer still.

While, therefore, there might be just opposition to the extension or increase of slavery, it had, in one respect, a wholesome effect. With some exceptions, were not those who were reared where the institution of slavery existed uniformly distinguished? What more brilliant constellation of great men than the Southern States had produced since the war of American independence? What men of the North were comparable with the great men of Virginia, South Carolina, and Kentucky? True, there were "an Adams or two, a Webster, and a Wright," but the great men of the country were from the South. Was there not a nobleness of spirit, a greatness of soul, that grew up wherever

the institution of slavery existed, and scarcely to be found elsewhere? Some reasoned against the abolition of slavery, asserting that if slaves were driven out, the State would be overwhelmed with a white population. A dense population invited pestilence and disease. Moreover, if a dense population should exist in Kentucky, the prospect that its free laboring men would obtain high wages would be decreased on account of competition; therefore, it was not to the interest of slave-holders to emancipate their slaves, even though they realized but three per cent. on their investment.

If slavery were abolished, sixty-one millions worth of property would be sunk, and one million eight hundred thousand dollars of net profits would be annually lost.* The slave-owner had the same right to the offspring that he had "to the original property." All property was secured by the same law; therefore, the only kind of emancipation that was just was "permissive emancipation."† There was another reason why slave property was certain to decrease in value. Those who lived on the Virginia borders of the commonwealth, where slave property was secure because of the lack of facilities of travel, knew that slaves in the interior, even when

* In Kentucky slaves were personal estate. See the Code, Chap. xv., Art. i. Compare Act of Virginia Legislature, December 17, 1792. It will be remembered that Kentucky was settled from Virginia, and was admitted into the Union in 1792.

† "The General Assembly shall have no power to pass laws for the emancipation of slaves."—Constitution of Florida (1838–45), Art. xvi., Sec. 1. See also the constitution of Virginia of 1850, Art iv., Secs. 20, 21. (Typical of opinion in the South on the subject at the time.)

from forty to one hundred miles distant from the frontier, were less valuable, more on account of the facilities for escape than by any act "of the meddlesome Abolitionists." What wisdom was there, then, for the people of Kentucky to go on investing their capital in the purchase of a kind of property which was continually becoming less secure and less profitable? Was any man living so blind not to recognize the hand of Providence, a Power that would yet prevail "even in Virginia, Maryland, and Kentucky"? Was it not perfectly certain from evidence on every hand that it was inexpedient to go on investing capital in slaves? The power affecting these changes was irresistible; already it had diminished the value of slave property in Maryland, and a similar decrease had already begun in Kentucky.* The people might desire to retard that power by legislation, "but when the Deity hath sent forth His fiat that this institution is to cease, it will cease, and no human effort can arrest it." Was there not evidence in Kentucky that disintegration had already begun, and that the institution was not destined to endure? In 1831 Kentucky had one hundred and forty thousand† slaves; in 1848, one hundred and ninety-two thousand;‡ representing an increase of capital of one hundred and forty thou-

* The decrease in the relative number of slaves, and in the value and security of slave property, was discussed at length in the Maryland constitutional convention of 1850. See the Report on the subject in the Proceedings of the Maryland State Convention to Frame a New Constitution, convened at Annapolis November 4, 1850, pp. 496–504.

† 140,010.

‡ 192,470.

sand dollars. The increase had kept up in proportionate ratio with the increase in the white population. With this increase, those who believed that slavery would always exist, and who desired its continuance in Kentucky, ought to be content. But, it was asked, why prevent the poor man from owning this kind of property? Why prevent him from buying slaves where he could get them cheapest? What evidence that the price of slaves would be increased by prohibiting the introduction of them into the State? The price was regulated by the price of commodities farther south.

The taxable property of Kentucky in 1831 was one hundred and twelve million two hundred and eighty-five thousand dollars;* in 1848 it had increased to two hundred and seventy-two million eight hundred and fifty thousand dollars,† an increase in seventeen years of about one hundred and fifty per cent. True, during this time some subjects had been added to the list of taxables, as moneyed capital and stocks, but in 1831 cash capital was scarce, exchanges were against the State, and its merchants who went North had to pay about five per cent. for funds negotiable in Philadelphia and New York. What, then, had been the effect of the emancipation act of 1833? Instead of bringing in slaves from Virginia and elsewhere, it had brought in money, and the State, though one of the younger, had become one of the moneyed States, with exchanges in its favor. Thus

* $112,285,780. † $272,847,696.

the limitation of the importation of slaves had increased the wealth of the State. For this reason a provision forbidding the importation of slaves should be incorporated in the constitution, and the traffic in slaves should cease. The increase of slaves meant a decrease in the productive power of the commonwealth. Furthermore, what kind of slaves were purchasable? Nearly every slave State, except Texas and Arkansas, was making the raising of negroes a profitable business. Negroes were the staple production of Virginia. Public opinion in Tennessee had so far triumphed that not a man was elected to its Legislature who was not pledged to support a measure against bringing any more slaves into that State. Honest servants, to whom property could be intrusted, could no longer be obtained there. If the door for the admission of slaves was opened, they would be imported in droves and chains, and of a character contaminative to those already in the commonwealth. At least, slaves were human beings, and their morality should be attended to. They should not be made to associate with rogues and rascals; the selling of slaves should be in the nature of a punishment and a means of controlling them. Had not the whole civilized world turned its back upon the African slave-trade, and was there anything worse in that trade than going into another State and bringing back slaves, the fragments of families, who were without offence, "driving them along in chains, as if they were beasts of prey"? Was it not a scene at sight of

which human nature revolted? No man could look upon a scene of this kind without feelings of the deepest remorse, as slaves "are human beings and have souls as we have."

In this paradoxical defence of slavery there may be detected a powerful principle which in less than a generation was to cause the overthrow of slavery in consequence of moral, not of intellectual, processes. Sensitiveness to suffering and wrong powerfully contributed to bring about the abolition of slavery in America. The institutions of this country are primarily benevolent in character, and are organized with altruistic purposes. The extermination of slavery itself was an altruistic process. When a Kentuckian confessed that slaves "were human beings, and have souls as we have," he was confessing the doctrine of equality of men, which, though not sanctioned by science or experience, is sanctioned by religion and the altruistic predilection of the people. Granted soul-equality, there must ultimately and soon follow a recognition of political and economic equality.

However, the proposition to empower the Legislature to allow owners to emancipate their slaves at once provoked opposition. Its immediate effect, it was said, would be that every man in a neighboring State who wished to manumit and get rid of an old and unprofitable slave, would only have to bring him into Kentucky and emancipate him there—to remain, a curse upon the State. Such a constitutional provision would flood the

State with a black population let loose without bond or security for good behavior, and every free negro who might choose could also come—a familiar argument in defence of slavery, and one always advanced whenever it was proposed in any State to recognize rights in persons of color.

In reply, it was said that Kentucky was increasing in wealth relatively more rapidly than its neighbors; that Ohio, with nearly three times the population, showed no such increase; that during the year 1848 its increase was but about eleven millions, while that of Kentucky was eighteen millions of dollars. In the same period the increase in Indiana was but four millions. Together, Indiana and Ohio had four times the labor of Kentucky, and yet the increased wealth of Kentucky had been greater than that of both these States and Illinois also. Why was white labor cheaper than black? Because in the free States it was cheaper than was black labor in Kentucky. There was a difference also between the African slave-trade and the slave-trade between the States. It was not as if a freeman were reduced to slavery; it was merely a change of masters. No man in Kentucky should have the power to manumit his slaves. A manumitted slave might be transported to Liberia, and, if not satisfied with his lot there, and choosing to come back, he, as a freeman, might immigrate to Kentucky, and no qualifications that might be enacted could exclude him from the State. If, however, he went out of the State, and was not freed until he passed beyond its territorial jurisdiction,

then the State might impose conditions preventing his return.

At this point in the debate the future of Kentucky seemed to be unveiled. For all time to come, it was said, Kentucky must continue as a frontier State, either slave or free, and the fateful question for her people to determine was whether she would separate from her old associates—those who were "bone of her bone and flesh of her flesh"—with whose institutions and customs she was identified, and unite herself with men who were foreign to her people in all the purposes and associations of life. The State would be ready for emancipation when she was ready to cut loose all her feelings for the South; when she was willing to see the cotton-fields sink back into their original quagmires and swamps, and the sugar plantations of the South return to their original forests; then, and not until then, would the State be ready for emancipation and for union with the North. Ten years later Kentucky had to choose between freedom and slavery—between the nation and disunion.

It is known now that the dominant policy of President Lincoln was to retain the border States in the Union, and that at the same time it was the policy of the government of the so-called Confederate States to identify the border States with the Confederacy.* The fate of the Union

* Acts and Resolutions of the Three Sessions of the Provisional Congress of the Confederate States. Richmond, 1861; pp. 7, 17, 66, 67. See Statutes at Large of the Provisional Gov-

depended on the conduct of the border States, whether they joined the South or the North, and this fact was known before the outbreak of the civil war. It was a fact according with economic conditions, the more clearly understood as the first half of the nineteenth century wore away. If slavery was to continue in Kentucky it must be continued in the most Southern slave-holding States, and be made secure against the acts of Congress, the laws of commonwealths, and public opinion in the border free States and throughout the Union. Slavery must become national.

It is interesting to note that at this time in Kentucky it was proposed to incorporate into the constitution the substance of the law of 1833, a proposition which, as an element in the evolution of the constitution, was similar to propositions in other States, which, first in the form of laws affecting the status of the debtor, the punishment of the duellist, the administration of oaths or affirmations in conformity with conscientious scruples, and the abolition of religious and property tests, were ultimately incorporated as constitutional provisions. The law of 1833 involved the fate of slavery in Kentucky, because it involved the question of negro emancipation. The substance of the law, however, went even further, because it involved the right of the property-owner to do as he pleased with his own. The law illustrates

ernment. Richmond, 1864; pp. 222, 226, 227, 256, 282. The same policy of the Confederacy applied to Maryland and Tennessee.

again the course of constitution-making and legislation in this country, which, in brief, has been for the benefit of the individual rather than for the benefit of the community. Granted that there was a right of property in slaves, why should its owner be prevented from relinquishing title to it any more than from relinquishing title to land or to bank stock? In the one case he would relinquish title for the benefit of the person whom he had formerly claimed as his property; in the other, he merely relinquished title for the benefit of some other person qualified to hold the property. The objection to the law, however, was its effect upon public policy, as public policy was then understood. It tended to invalidate if not the right at least the security of individual property in slaves. Was not the safety of the State of greater moment than the will or the right of the would-be emancipator? Thus, after all, the contest was not unlike that arising so frequently between the claim of individual right and the compulsion of public policy. The real question, aside from its moral quality, was the right of the individual as against the right of the commonwealth; and so long as the right of property in men was recognized by constitutions and laws there could be no harmony in opinions held on the one hand by radicals who advocated slavery, or on the other by radicals who favored emancipation or abolition. Emancipation, if permitted in Kentucky, would tempt slave-owners in other States to free their slaves there. The advocates of emancipation could defend their

claims on the ground of the individual right of the property-owner to dispose of his own, as well as on the ground of his right from motives of humanity to satisfy his own altruistic wishes.

A resolution offered on the 10th records a phase of the evolution of American democracy quite characteristic of the first half of the nineteenth century. Although during this time the powers of the commonwealth Governors had been increased far beyond those of the preceding century, yet with this there came the inevitable consequence of the not infrequent abuse of these powers. To correct one abuse, it became necessary, as this resolution expressed it, that whenever the Governor should remit a fine or a forfeiture, or should grant a reprieve or a pardon, he should enter his reasons for the act on the records of the Secretary of State, in a book kept for the purpose. This should be under the control of either House of the General Assembly, and might be published if deemed proper. The compulsory process of requiring the Governor to go on record was intermediate between the denial of the pardoning power to the executive in the eighteenth century and the organization of that power in a Board of Pardons at the close of the nineteenth.

Another resolution sought to apply the representative idea in a new way, by providing that the number of justices of the peace for each county should be in proportion to the number of its qualified electors, and should be fixed in the constitution. The same idea was also at the basis of

the proposition to establish a Board of County Commissioners, consisting of the justices of the county, whose sole jurisdiction should relate to the revenue of the county, and to its roads, warehouses, ferries, and mills—a proposition submitted for the purpose of securing a more efficient local government. Another resolution, to correct a common evil, was proposed, that all property should be taxed according to its value, in an equal and uniform manner throughout the commonwealth, but it was not discussed till later. To correct the habit of negligence in collectors of revenue and in the disbursing officers of the State, it was proposed to make all those officers, and also attorneys and lawyers, who failed to pay over money collected in an official capacity ineligible to office.

On the 11th the discussion of slavery was resumed, and chiefly with a repetition of arguments long heard in its defence—that it elevated the white race as well as the black; that it was the natural condition of the African; that if contrary to the law of God it would have ceased long before; that it was authorized by the Bible. If considered property, the slave should not be the subject of discrimination more than any other kind of property. Voices were raised in warning that if the principle of the act of 1833 was incorporated into the new constitution, it would prove to be an entering wedge for emancipation. Objection was made to the exclusive control of slavery by the Legislature, on the ground that this would be but a continuation of antislavery agitation. From the

passage of the act of 1833 until its repeal in 1848 but one session of the Legislature had been free from such discussion. Was not the repeal sufficient evidence of the wishes of the people of the State that its citizens should be allowed to import slaves? Why, therefore, should not such a privilege be secured by the constitution itself, which was only the final expression of the will of the people? The effort to restrict the Governor in his exercise of the pardoning power produced a second resolution, to prevent its exercise entirely, "under false or partial representations to the Governor by the friends of convicts"—a suggestion in itself of one of the abuses of the pardoning power commonly complained of at this time.

On the 12th, in the further discussion of slavery, a comparison was drawn between servitude in Massachusetts and servitude in Kentucky. The people of Massachusetts were served by white people in the menial offices in which they of Kentucky were served by slaves. The population of the two commonwealths was nearly the same, yet there was a remarkable difference in the number of poor sustained in each by public charity—three thousand in Kentucky; in Massachusetts, twenty-eight thousand. In the slave commonwealth the aged and infirm were taken care of by the master, the Legislature being empowered to compel him to the duties of humanity. Though Massachusetts boasted of its population and enormous wealth, her laborers were absolutely excluded from the social circle. Was it not easy to prove that human misery, crime,

and degradation were far greater in free States, with a crowded white population, than they ever could be in the slave States? Was it not true that, in the free States, the capitalists employed only the best laborers and left the deficient ones to be supported by charity? Was there not a greater amount of misery, degradation, and crime in Massachusetts than in Kentucky? The emancipation of the slaves, therefore, could be nothing less than an evil—"free them and they become the lazzaroni of the State"—they would crowd the cities, they would visit the country only in marauding parties, they would become idle, vicious, and ungovernable. In those parts of Philadelphia and New York in which free negroes congregated the percentage of crime was highest. Even if a free negro accumulated property, he never could become an American citizen.* He was not one of the people, nor could he ever aspire to political life. If the slaves of Kentucky were freed, they would be more difficult to govern. Instead of being productive, they would become destructive, of wealth; they would be advanced, not in morality, but in crime. The constitution, therefore, being a shield to the white people, ought to protect them against emancipation, by permitting the further introduction of slaves into the State. The principle that private property could not be taken without the consent of the Representatives of the people, and without full compensation first being made, was fundamental,

* 4 Georgia, 68.

and ought never to be violated. The constitutional provision forbidding the importation of slaves and encouraging emancipation violated it. The constitution was made to protect the fruits of labor, and every slave-owner was entitled to its protection. No set of men in Kentucky had the right to violate a principle of American government. Why hasten the course of nature? The Indian receded before the Saxon, the inferior before the superior race. So, in the march of population, when white labor became cheaper than slave, then slave labor would yield and slavery would disappear. Undoubtedly in the commonwealth there was a strong party favorable to emancipation who eagerly desired to have an emancipatory clause incorporated into the new constitution; a second party in the State was radically pro-slavery; a third party was pro-slavery, but was willing to adopt a constitution providing for permissive emancipation under the Constitution of the United States.

Citizens of the free States were under the most solemn obligation to return Kentucky its runaway slaves; but was there not a party in the United States who regarded that great principle in the federal Constitution as null and void, and who considered itself to have a right to violate and nullify it? Not that the emancipationists of Kentucky were Abolitionists; but, nevertheless, they were in effect contributing to results sought by Abolitionists. What was the meaning of the pending proposition to abolish slavery in the District of Columbia—one of the elements in

the compromise of 1850? Was it not that there might be a place of refuge where the Constitution of the United States imposed no obligation upon its citizens to surrender runaway slaves? There was an effort in Congress to abolish slavery in places—even within the limits of slave States—over which Congress exercised exclusive jurisdiction. Were not the liberty laws* in defiance of the national Constitution? These abolition forces were operating outside of Kentucky, but within the State there were citizens who had "formed themselves into bands for the purpose of enabling slaves to escape."

All these efforts tended to render slave property insecure. Those in favor of emancipation had made startling propositions — emancipation without compensation; emancipation when the slave had reached a certain age, at which time he should be hired out for three years and the proceeds of his labor be applied to his transportation to such place as might be chosen for his future home. But did the power of emancipation exist? Could the State take the property of its citizens and appropriate it to public use without compensation? The relation between master and slave originated as an agreement among those who formed the first constitution of the commonwealth, that the master should enjoy the labor of

* Acts of New Hampshire, July 10, 1846; Vermont, 1843 (Revised Statutes of 1851, Title xxvii.); Massachusetts, March 24, 1843; New York, 1840; Prigg *vs.* Pennsylvania (1842), 16 Peters, 539; Pennsylvania, Act of Assembly, 1848; Rhode Island, 1847.

his slave—a solemn agreement in 1792 between the sovereign power of Kentucky and its citizens. Was it not provided in the bill of rights that no man's property could be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him? By what authority could this principle be disregarded? Did not the Constitution of the United States declare that no State could pass any law impairing the obligation of a contract? Had not Chief Justice Marshall himself decided that such a law was unconstitutional?* An American was a citizen of two great sovereignties: the State and the United States. Kentucky was not an absolute sovereignty. One of her disabilities was that she could not pass a law impairing any contract. As had been defined by Marshall: "The sovereign power of the State is not precluded from making a contract with the citizens of the State; but, having made such a contract, is not the sovereign power of the State under the same disability to violate that contract that the citizen is placed under?" Kentucky had no power to divest a citizen of his right of property guaranteed to him by the constitution of the State. Even if such a power existed, its exercise would not be expedient. Such an exercise would eliminate from free government the principle that had called forth Magna Charta—"that great principle which lies at the foundation of the liberties of this coun-

* Fletcher *vs.* Peck, 6 Cranch, p. 87.

try." If it were once proclaimed abroad and throughout the free States that Kentucky, in her sovereign capacity, could take away the property of her citizens, the refuse population of every country in the world would hasten into Kentucky, organize there as voters, and deprive honest citizens of the property which they had gathered by their toil. Even if the slaves were emancipated and sent to Liberia, their condition there would not be one of prosperity; they were wholly incapable of maintaining themselves without the superior direction of the white race. Nor was the idea of free emancipation practicable. Immediately upon the adoption of an emancipative constitution the owners of slaves would leave Kentucky and carry their slave property with them. The State would be deprived of its most desirable population. Virginians and Carolinians would not emigrate to Kentucky; those only would come who, long in the habit of agitating the question of emancipation, came for the purpose of continuing its agitation in Kentucky, to the alarm of its people. Emancipation could result, therefore, only in an exchange of a desirable for an undesirable population. No system was more benevolent than slavery. Where in Kentucky was there an instance of want? Its people were the happiest, the proudest, on the face of the earth. The agitation of the slavery question could only end in the disruption, not of the State, but of the Union. The preservation of the Union itself depended upon the maintenance of Southern interests

and Southern institutions. Were not five black men equal to three white men? Therefore the future growth and power of the commonwealth depended upon the increase of its slave population. If slavery was such a curse, how did it happen that the people of Kentucky were the most enlightened, the richest, and the most cultivated of the earth? No one would propose to violate the chartered rights of any of the banks of the State; yet the rights of slave property were as fundamental as those of the banks. The question of slavery in Kentucky was only a part of the Free-soil question of the nation.

It was in vain that the defence of slavery was declared to be a defence of property; or, as shown in the resolution introduced on the 15th, that the right of the citizen to be secure in his person and property was not only guaranteed by all free governments, but lay at their very foundation. As slaves were property—not only those in being, but also those who might be born—there was no power to incorporate into the constitution of the State any provision depriving the citizen of his property without his consent, unless it were for the public good, and then only by making him a just compensation. The resolution was no sooner read than its discussion began. Hardin, a Pennsylvanian, insisted that the convention had power to do anything that the Union could do, unless forbidden by the Constitution or the treaties of the United States or the laws of Congress. None of these forbade the emancipation of slaves. The

convention had the power, but it was not politic to exercise it. The proposition under discussion involved the assertion not only that the convention of 1849 possessed no such power, but that no convention which might assemble in Kentucky could ever exercise the power to provide any laws or mode of emancipation of slaves in the commonwealth. Property in slaves was acquired by organic law, and the same power which brought the law into existence could provide for the control of such property. To the objection that slave labor was unnecessary, it was replied that the free States could not raise hemp and tobacco; that Kentucky and Missouri had, in the production of hemp, a monopoly that would continue as long as slavery lasted. The Southern markets would always keep the slaves of Kentucky "down to the health point." Emancipation in the West Indies was destroying tropical products; and, in consequence, their production would be increased in the United States. The growth of our navy and our mercantile marine would increase the demand for hemp. Without slaves the production of hemp, which made the lands of Kentucky and Missouri valuable, would be impossible.

From time to time members rose and read long passages from the Bible to prove the righteousness of slavery. Justice McLean was quoted at length as authority for the sovereign control of slavery by the State.* According to him, "a

* Groves *vs.* Slaughter, 15 Peters, p. 449.

State, but not Congress, might at its discretion admit or prohibit slaves." The Constitution of the United States treated slaves as persons, but they had the character of property by local law. Each State had the right to protect itself against the avarice of the slave-dealer—a right "higher and deeper than the Constitution." Chief Justice Taney, echoing the opinion of McLean, was cited as authority for the doctrine that the power over slavery was conclusively with the several States, each having the right to decide for itself whether or not it would allow slaves to be brought within its limits, and to determine their condition and treatment. Any action of the States upon this subject could not be controlled by Congress, either by virtue of its power to regulate commerce or by virtue of any other power conferred by the Constitution. Was not McLean from a free State, though a native of Kentucky? Was not Chief Justice Taney a citizen of Maryland? Thus the weight of authority of two judges residing in different sections of the Union, the non-slave-holding and slave-holding, was in defence of slavery.

The law of property was in the nature of a solemn contract, higher than any constitutional sanction. That contract gave a title to the slaves in the State, and, without violating it, the State could not deprive men of their right to their property. The Abolitionists in the North, as a party in Congress, were endeavoring to deprive slave-holders of their rights and to exclude them from the country for which they had shed their blood. This was

said in reference to the Free-soil effort to exclude slavery from the California country. Kentucky was setting an example which would number the days of the Republic. It should bind itself closely to States with which it had a common interest; it was a frontier State, and in the great impending contest it was to be the battle-ground. All attempts, therefore, to restrict the introduction of slaves "to meet the exigencies of the country" would be a "direct attack upon the institution of slavery itself."

CHAPTER II

CHANGES IN THE JUDICIAL SYSTEM

Among the resolutions proposed on the 16th, one gave each party in a civil suit the right to make the opposing party a witness; another made seven years' peaceable possession of land a sufficient title, excluding from this right infants and persons of unsound mind. On the 17th, one was proposed debarring negroes, mulattoes, and Indians from the militia; another, suggestive of the strengthening of democracy, affirming that the people of the State were fully competent to judge of the qualifications of all candidates for office, whether executive, judicial, or ministerial,* and for this reason a certificate of election was the only one that should ever be required to enable a citizen to enter upon the duties of any office to which he was elected.

This resolution on the judicial character of popular elections called forth a debate — one member remarking that it was impossible that all the voters could be personally acquainted with the qualifications of the candidates for the bench. Admitting that the people of Kentucky were as

* Administrative.

intelligent as any, and the people of one county as those of another, the qualifications of a candidate for judge could scarcely be known to electors who voted in a part of the district in which he was personally little known. Another member thought it unnecessary to vote on the resolution, as the daily debates of the convention proved its willingness "to return the election of the officers" to the people, and "in favor of restoring to the people their rights"; but the convention should not go too far in establishing the elective system; it should be remembered that prejudices would be encountered, and prejudices frequently deprived the people of able public servants. Of course, there was no unwillingness in the convention to distrust the people, or to doubt that they were fully competent to perform the duty of selecting public officers, but there should be some qualification for office other than a writ of election. The discussion was not suffered to pass without a reference to the principle that all political power is inherent in the people; that they are competent for self-government and the safest depositories for political power; and that to refuse to make officers elective, or the qualifications for office such that the people would be satisfied, was striking out "the great principle that the people are competent for self-government"; but there should be no discrimination; every office should be elective.

It soon appeared that the proposition to modify the judicial system of the State originated in the

disapproval which members of the Legislature had from time to time expressed because the courts had declared some acts of the Legislature unconstitutional. The Legislature had sought to impeach the judges. In order to secure an independent judiciary, it was necessary to eliminate the political element as far as possible from all impeachments. If the removal of a judge depended upon the will of only a majority of the popular branch of the Legislature, what judge would dare to stand between the citizen and the encroachments of the Legislature? Few men had sufficient moral power to endure such a strain. To the judiciary were intrusted the life, the liberty, and the property of the citizen. It was "the political Ark of the poor man." If judges, however, by the constitution, were placed in the power of a bare majority of the Lower House, the protection of the citizen would be greatly endangered; for a majority of the Legislature was not always representative of a majority of the people. To empower a mere majority to impeach the judges would concentrate the chief powers of government in the Legislature. The separation of powers sought by the constitution, operating as checks and balances, would cease. The judiciary should be placed beyond the reach of merely partisan opposition. For this reason the Governor should be empowered to remove a judge only on the address of two-thirds of each House, not of a mere majority of the General Assembly. Such a concession to the base will of a mere majority would

resolve the commonwealth into the condition of revolutionary France.

Already in various parts of the Union public sentiment had powerfully contributed, by constitutional revision, to the restraint of special legislation. In this opinion the State now shared. On the 18th it was proposed to further limit the Legislature by forbidding it to suspend any general law for the benefit of an individual, or to pass for his benefit a law that might be inconsistent with the general law of the State. This limitation, however, should not restrict the Legislature from granting charters to corporations. It was largely in compliance with the general demand for limiting the powers of the Legislature that an effort had been made to prevent the impeachment of judges, or their removal save with the consent of two-thirds of the members of each House. Public confidence alone secured the repose of society. In any way to undermine the object of that confidence would result disastrously. It was necessary to make provision for the removal of a judge proved guilty of misdemeanors in office, and therefore the constitutions of all the States, as well as that of the United States, made provision for his impeachment. Twenty-seven of the thirty States of the Union had so provided, and at least twenty required that the address to the Governor should be carried by a two-thirds vote of each House. Not yet was it common to elect the judges, the few States making such provision not being sufficiently numerous to prove the wisdom

of the method; but the old method of appointment must soon be abandoned. Were not the intelligence of the American people, and their capacity to select capable persons for public office, proved by that body of distinguished men who had filled the Presidency of the United States? All the State constitutions recognized that the powers confided to the three departments of government emanated from the people, and that public officers were merely their agents. The Legislature was not infrequently arrayed against the Governor or the courts. Its powers should be restrained in order that popular prejudice and passion might not defeat the purposes of government. Even the people themselves needed such a restraint, as a check to imprudence. This was proved by the history of all governments, and best proved by the written constitutions of the American commonwealths, which were in themselves checks on popular instability. The foundation of government rests upon the restriction of popular rights? If this restriction is not provided, then the agents of the people will have no discretion in the management of public affairs. The jealousy too frequently existing in the Legislature towards the executive and the judiciary, it was said, needed no encouragement. It was not that the law-maker should consider his work as perfect, and that he should view with apprehension any different construction of it by the judiciary, but that to prevent unconstitutional legislation the judiciary should be empowered to determine the status of the law;

therefore, it was inexpedient to introduce into the constitution a provision which would weaken the safeguard provided for the people by an independent judiciary. Could the responsibility of the judge be secured if he was elected for a limited term of eight years, and be made responsible to a majority of the two Houses? Would such provisions contribute to the independence of the judiciary? Originally, in England, the judge was dependent upon the will of the sovereign for appointment, and continued in office only during the life of the King; the latter error was soon corrected, however, by an act continuing judges in office notwithstanding the King's death.

The revolution in England left the appointment of judges in the hands of the Crown, which appointments lasted during good behavior, the judges being responsible to Parliament. The American commonwealths followed this precedent, the power of appointment being given by the people to the executive, the judges being made responsible to the Legislature. But the British precedent was not strictly followed, as an American judge was removable in some States by a majority, and not, as in England, by two-thirds of the Legislature. In Kentucky, from the organization of State government, the judges had been appointed by the Governor. It was now proposed to take that power of appointment from the Governor and elect the judges for a term of years. The tenure of office had previously been during good behavior. The proposed changes well ex-

pressed the character of the reforms that were being matured in American democracy in 1850. Those who opposed it appealed to the precedent of the Philadelphia convention. Its members, though "coming as they did just from the very fires of the Revolution, did not think the people competent to elect the President; they looked to the past, and the turbulent, fallen democracies of ancient times," and were brought "to the melancholy conclusion that the people were unsafe depositories of power." For this reason they introduced a body of electors between the people and the candidate for President. "It was intended to be a deliberative body, with power to choose a President for the people," but it had become "a mere ministerial body," registering the popular will. Already, however, the opinion was strengthening in the country that the federal Constitution should be amended so as to provide for the election of President and Vice-President by popular vote. In this way these officers would be made directly responsible to the people. The reason for amending the federal Constitution in the choosing of the executive was equally a reason for amending the constitution of Kentucky in respect to its judiciary.

The President of the United States has a qualified veto upon Congress, as it may be overcome by a two-thirds vote; not so the veto power which the judiciary possesses over legislative acts. The judicial veto is absolute and unqualified. Was it not necessary, therefore, to provide some checks

upon the judiciary, and was there any other than the Legislature? As the representatives of the people, frequently chosen, they were the natural guardians of popular interests, and, as naturally, the check upon the judiciary. To this argument for increasing the power of the legislative for the purpose of checking judicial authority, it was replied that if it should become a provision of the constitution, whenever a Legislature assembled, instead of proceeding with necessary legislation it would proceed to the removal of unpopular judges. As the State would be, for judicial purposes, districted, the people of one district in which a judge might be unpopular would agitate for his removal, and the time that should be employed in making laws necessary and proper would be consumed in political agitation. The function of the judiciary is to restrain the action of the Legislature and to confine it to its constitutional course. Even in Illinois, said one member, a State "certainly democratic enough," and where the candidates for the Senate of the United States* canvassed the whole State, as did the candidates for Governor in Kentucky, the constitution of 1848 required two-thirds of the Legislature to remove a judge. Stability cannot be expected in the judiciary if its tenure of office is for but a few years, if it is elected directly by the people, and if it is removable by the Governor on the address of merely a majority of the Legislature?

* As in the Lincoln-Douglas canvas of 1858.

Is it not an affair of common knowledge that when a lawyer is elevated to the bench he loses his practice, and that doubtless he would desire to be re-elected—a desire of itself the "very best guarantee the people can have that the judge will discharge the duties of his office properly."

The discussion over the judiciary disclosed one of the causes for calling the convention. For years there had been public discontent with the conduct of some of the judges in the lower courts, and particularly because the judiciary was not sufficiently responsible to the people. It grew at length into a demand for the judicial districting of the State—a strong proof of that increasing attention to local government characteristic of the half-century. Judicial responsibility would be better secured, it was thought, by subdividing the State and allowing the people of each section to choose their judges. At least, there would be less danger of error in the election, in the term, and in the dismission of a judge. The people should be the primary power. It was not that they wished to weaken the judicial department; they only desired to make it as responsible to themselves as were the executive and the legislative.

The sentiment of the people of Kentucky on this subject was not different from that in other parts of the Union. As successive State constitutions had been adopted, one by one they had modified their judiciary article by abolishing the appointive system and many of the old provisions which made it difficult to fix judicial responsibility.

The reform that was sought in Kentucky was, therefore, only a part of that demanded at this time throughout the country. Granting that a judge must be independent in order to be pure, that the salary of his office must be sufficient to induce able men to accept it, that judicial integrity should be able to resist the usurping tendency of other departments of the government, would these be secured if the judiciary was made elective and responsible to the majority of the General Assembly? The arguments for life-tenure made by various members of this convention were the same as those made sixty years earlier by Hamilton in *The Federalist.** Independence in the judiciary could be only secured by making the judicial office one to be held during good behavior; to depart from the precedent already established in the commonwealth was to adopt "a mere guess-work form of government." An elective judiciary signified that the office of judge would be made political, for the judicial candidate would have to appeal to the members of a political party. Human nature could not withstand the temptation to avail itself of all devices by which to obtain office, and the candidate for the bench could not be expected to be free from such frailty. To make the judiciary elective was to throw it into the hands of politicians, making possible such political bargains as had recently been struck in Ohio, by which the control of the

* *The Federalist*, Nos. lxxviii.–lxxxiii.

judiciary was made the price by one party for the election of United States Senator by the other.*

The difference between a majority and two-thirds of the Legislature of Kentucky was quite insignificant. The proposed Lower House was to have one hundred members, of which fifty-one would be a majority. If the Senate consisted of thirty-eight, twenty would constitute a majority. If two-thirds were required, there would be twenty-six Senators and sixty-seven Representatives. The change from two-thirds to a majority did not indicate a very serious revolution. It was the Legislature in either case that impeached the judges, or drew up an address for their removal. In either case the General Assembly became a higher court of judicature, acting in behalf of the people. That each branch was to act separately presumed the high character of the court. It would be practically impossible to make the judges impeachable by a direct vote of the people.† The first principle of government in America is that the will of the majority is the law of the land: should not this rule apply in determining the responsibility of judges? Precedents abounded in the State constitutions for the periodical termination of official responsibility. Massachusetts provided for the removal of its judges by the Governor, with the consent of the Council, on the address of both Houses of the Legislat-

* Referring to the election of Salmon P. Chase to the United States Senate in 1849.

† There were 152,234 voters in Kentucky at this time.

ure; and further, that in order that the people might not suffer from the long continuance in any place of any justice of the peace who failed to discharge the duties of his office, all justices' commissions should expire seven years from their date of issue. A like provision existed in New Hampshire and Rhode Island. In New York the judges were removable by impeachment, a majority of the Senate and the Supreme Court constituting the court of impeachment, and the judges being removable by two-thirds of this court. Moreover, in Rhode Island the judges were elected semi-annually.* Thus the majority principle was not a new one in America.

The American Revolution left the American people a heritage of litigation, and their litigious character continued as a distinguishing mark. Perhaps no people in modern times have been more given to litigation. The individualistic character of American democracy engendered law-suits. In proportion to population, the number of suits was greater in the last quarter of the eighteenth century and during the first half of the nineteenth than in any equal time subsequently. The disappearance of the litigious spirit in this country has kept pace with the disappearance of the frontier. With the increase of moral and so-

* This statement is erroneous, the constitution of Rhode Island in 1842 providing that each judge should hold his office until his place was declared vacant by a majority of each House. The judges of the Supreme Court were elected by the two Houses in joint session. Art. x., Sec. 4.

cial efficiency there has evolved a spirit of arbitration and peace. At last this spirit dictated clauses in State constitutions, and the resolution carried in the Kentucky convention on the 23d, that tribunals of conciliation should be established in every county, suggests the ameliorating tendency of the times. The mover of the resolution cited the convention of New Jersey of 1844, and of New York of 1846,* as a sufficient precedent for Kentucky. The object of the tribunal was to prevent litigation. Denmark had such courts, and within one year from their organization lawsuits had decreased from twenty-five thousand to ten thousand. In Prussia and in France they had been established with good effect. Their adaptability to America was not, however, assured. It was believed that by establishing such courts the American people could settle small disputes by arbitration. In defence of the proposition, the report made to the New Jersey convention was read.† In each town or precinct persons chosen by the people should sit as a court one day in each week for the purpose of receiving complaints, for issuing summonses for the appearance of litigants at the next regular meeting, and for taking evidence. Only the parties and their attorneys should be permitted to be present in the court. Its duties should be to hear complaints and replies and to endeavor

* Debates and Proceedings in the New York State Convention, 1846 (Argus edition), pp. 59, 81, 92, 461, 488, 599, 601, 613, 638, 641.

† See Journal of the Proceedings of the Convention to form a Constitution for the State of New Jersey, 1844, pp. 79–80.

to have all difficulties adjusted amicably. As an absolute rule, nothing that passed in the court was to be divulged by its members, nor could it be given as evidence in courts of law. If the attempt to reconcile failed, the court should grant to each party a certificate stating that plaintiff and defendant had appeared, but that their differences were not reconciled. These certificates were required by the courts of law in order to oblige the parties to seek reconciliation. The fee would be trifling, and was to be paid by one or by both suitors, as might be decided by the judges of the court. Numberless cases having their origin in trifling differences between neighbors and friends, which might be amicably adjusted through the agency of a third person, could be settled in such courts. It was suggested by another member that if the judges of conciliation were farmers and not lawyers, their labor in the laudable attempt to prevent litigation would have much more public confidence.

Another resolution introduced at this time was admitted without debate—that the new constitution specify the amount of property which should be exempt from execution; a proposition constituting in itself a record of a new phase of public opinion.

As the debate on judges and the judicial system continued, arguments were introduced based on the experience of other States and on the workings of the federal system. The judges should not be re-eligible, principally because they might

become too old to serve a second time efficiently. The friends of re-eligibility cited the cases of Chancellor Kent and Judge Spencer, of New York, who, for twenty years after the time fixed in the New York constitution when they were supposed to be incompetent to administer justice, had displayed great mental capacity and legal learning; and, further, that New York, satisfied that the system of judicial ostracism adopted in its constitution of 1821 was wrong, had abandoned it in 1846. By refusing to make the judges re-eligible the State would be deprived of the services of many of its ablest men. Judicial experience obtained in a term of four, six, or eight years, only prepared the judge for the best performance of his duties. What lawyer would be willing to give up his practice for the sake of elevation to the bench if a constitutional restriction limited him to a term of six years? During this time his practice would have gone to others, his own habits of life would be changed, and he would in a large measure be unfit to resume his former place at the bar. A short judicial term, therefore, insures judges of inferior capacity. The judiciary under such a system will be composed of broken-down lawyers. A court in which the bar and the people have confidence is the best means of decreasing litigation. Was it not because the State tribunals of original jurisdiction had lost the confidence of the people and the bar that business in the appellate court had been increasing for fifteen years? Admitting that the creation of appellate courts had a

tendency to increase litigation, it should be remembered that these courts are of great public convenience, for they are held in the several districts of the State at the convenience of suitors. Although the elective system was now coming in vogue in the Union, there were reasons, it was said, why it should not be adopted in Kentucky, or indeed in any commonwealth. The choice of judges by popular vote was too frequently determined by the vote of the crowded and dependent population of towns and cities. Voters who had no property interest in the State, being often in the majority, determined the character of an elective judiciary. Too much importance should not be attached to the power of impeachment, as frequently it was exercised only for partisan purposes. Had not the inefficiency of this power been illustrated in the trial of Judge Chase?* Was not his acquittal a proof of the power of partisanship? Even John Quincy Adams, whom some thought to be worthy of the confidence of the nation, stood first among those who voted "not guilty" upon every charge against Judge Chase. What was the charge? That the judge had decided it to be treason against the government to resist by armed force the execution of a statute of the United States. Had not Justices Iredell, Peters, and Patterson decided the same question? The decision of the Senate could not have been other than for acquittal. The House of Representatives voted

* In the United States Senate, 1804.

the impeachment of Judge Peck on the charge that he had punished a lawyer for contempt because of a criticism in the newspapers. The House thought it was an improper exercise of authority, as the offence had not been committed in the court, and that it did not properly belong to a judge to punish for contempt because of something said or done out of court; the Senate, however, thought otherwise. The judge was acquitted, but the trial "improved his manners as a judge," and led to the passage of an act of Congress defining what should constitute contempt of court. The history of judicial impeachment in Kentucky was similar. In 1812 the Legislature brought a charge against an associate judge of the county of Nicholas that he was an alien; that though twenty years a resident of the United States he had not taken the oath of allegiance, and that he had declared himself delighted with a British victory. He was condemned by the unanimous vote of both Houses. An attempt was also made to remove Judge Clark under the two-thirds rule, and a majority in both Houses favored the proposition, but the provision requiring a two-thirds vote saved this able jurist from impeachment. Again and again in the history of the State had the impeachment of judges, as well as of other officers, been the result of mere political prejudice. Surely the people should be protected from such violations of good government; and the member quoted at length from Rutledge, of South Carolina, to the effect that the judicial department was intended by the people to be

a check upon the legislative, but that such a check could not be secured if, by an ordinary act of legislation, the Legislature could destroy the judiciary at pleasure. It was evident that the convention was about to change the judicial system of the State by making judges elective. To secure the people against a corruptible judiciary, a member, on the 24th, submitted a resolution that if any candidate for the office of judge of the court of appeals or of the circuit courts should "engage in public speaking or treating" during his candidacy and be elected, upon written information of his conduct, supported by the oaths of two or more respectable witnesses, the attorney-general should issue a caveat returnable against him, and to the succeeding General Assembly, who should try him according to the provisions of the constitution for the trial of judges. Conviction should disqualify him from holding office; but this proposition, so evidently unfriendly to the ordinary habits of candidates for office, was not seriously discussed.

The constitution of 1799 provided for the appointment of judges for life, and created a supreme court and a court of appeals. The judicial changes now proposed not only made a new definition of the functions of the court of appeals, but also proposed a new set of courts, to be called the circuit courts. Although by law circuit courts existed, the changes proposed in their organization and functions amounted to a new system. The judicial problem in Kentucky was one which

is ever present in the American commonwealth—whether, to accommodate the ever-increasing volume of judicial business, the old courts shall be increased by additional judges or new and intermediate courts be established? Usually the State attempts to solve the problem by organizing a new court, as a mere increase in the number of judges in the old court does not necessarily effect a more speedy clearance of the docket. The new court is usually in the nature of a circuit or district court, and its jurisdiction is original, and is final in cases in which the amount of money involved is limited by law. The court of appeals of Kentucky, it was claimed, was sadly behind its docket. The mature deliberation of cases was almost impossible; nearly half of those requiring written opinions involved the defence of rights of property, but so crowded was the docket that the judges were unable to weigh every case thoroughly, and in consequence many decisions, which later experience proved to be judicial errors, became a part of the law of the State. The opinions of the judges of the court of appeals were a guide to the judges of the inferior courts. If the system of circuit courts was adopted, provision should be made for adequate law libraries, to enable the judges to refresh their memories; a court-house must be provided in each district, and each court must have its staff of officers. A circuit-court system, therefore, would prove to be more expensive than the existing system. Might not the court of appeals be subdivided

into branches which should have final jurisdiction in a particular class of cases? If the federal system was adopted, and the judges of the court of appeals presided in the several districts in association with the resident circuit judges, it might often follow that the opinion of the court would not be unanimous, and that the judges of the one court might be arrayed against the judges of the other.

On the 25th the committee on circuit courts made its report. These should be established in each county, their jurisdiction unchanged, but subject to modification by the Legislature. From the circuit courts the right to carry cases to the court of appeals should continue. The State should be laid off into twelve judicial districts, having due regard to business and population, and no county should be divided. Circuit-court judges should be elected by the people of the several districts. A person elected judge in the district should vacate his office if he removed from it. The number of districts could be increased from time to time as the Legislature might determine, in order to keep pace with the judicial business of the State. The salary of the circuit judge should not be less than sixteen hundred dollars. The qualified voters of each district should also elect a district attorney, who should be a resident of the district and a practising lawyer; his salary should not be less than three hundred dollars. The district electors also should choose a clerk of the court. The Legislature was to have the power

to change the venue in any criminal prosecution.

There were at this time nineteen circuit judges in the State, each receiving twelve hundred dollars per annum. By the new plan the number of judges was decreased, and their duties and salaries increased. It was believed that under the existing system the functions of the judge did not engage him more than eighty days in the year; therefore, the salary of twelve hundred dollars was not wholly inadequate, as his duties did not preclude him from following other pursuits. The new proposition was to increase his salary and require him to sit as judge one hundred and fifty days in the year. The old salary of the commonwealth attorneys was not increased, but "by way of inducing the best lawyers in the State to take office," the old law was revived in relation to the collection of fees on indictments for misdemeanors. No serious objection could be made to this plan, it was thought, as the fees came "not from the people, but from the violators of the law," and in most instances they would not amount "to more than fifteen shillings each." The old circuit-court system cost the State nearly twenty-nine thousand dollars a year;* the new would cost less than twenty-three thousand.† The people had complained that the government was too expensive, and the proposed plan of circuit courts, it was thought, would remove the cause of these complaints and at the

* $28,600. † $22,800.

same time secure a more efficient system. Certainly it would be to the advantage of the State to give to the circuit-court judges a compensation that would obviate any necessity for them to resort to another business to make a living.

The condition of the courts of Kentucky, and the reasons for their modification, may be said to be typical of the commonwealth courts at this time; and the arguments in this convention respecting an appointive and an elective judiciary, the term of the judges, their duties, compensation, and re-eligibility, and the manner of removing them, are typical of the arguments on the subject in other conventions. The opponents of “branching the court,” as it was called, advocated the addition of new judges, because less expensive and more efficient. If the judicial business compelled the court to be far behind its docket, this defect could be remedied by increasing the number of judges. The cost for salaries would not be so great as the expense of preparing court-houses and establishing a law library and a staff of court officers in each of the districts. The friends of the elective system frequently and somewhat exhaustively cited the opinions of the people in States in which that system had been adopted—as recently in Illinois an able judiciary had been secured. In Louisiana there was a prevailing desire that the judges should be elected by the people, and lawyers residing near the Mississippi line, who practised in both commonwealths, had stated as their opinion that they had much bet-

ter judges in Mississippi, and that judicial business was conducted far better than in Louisiana. Tennessee had an appointive judiciary, but the people there had recently decided for the elective system. There seemed also "to be a tendency all over the Union to adopt it." The defenders of the circuit system also cited the experience of other commonwealths in its favor. In New Hampshire, Vermont, Connecticut, and Delaware, in Georgia and Ohio, the supreme court sat in every county; in Massachusetts, in eight different places. New York consisted of four judicial districts, in each of which the supreme court sat every other year; Pennsylvania was divided into four districts, and the supreme court met at different times in each. In Virginia and South Carolina the court met in two different places; in Alabama and Mississippi the supreme court was not a circuit court; in Illinois it was organized in three branches; in Missouri, in four; in Wisconsin, in five. Thus the branching of the supreme court prevailed in the majority of the States. For many years in Pennsylvania the court had met at Philadelphia, at Harrisburg, at Sunbury, and at Pittsburgh.* Had Pennsylvania a State library travelling about in a cart? In old times, in Kentucky, a wheelbarrow would have carried all the law-books the judges had to consult. One objection to the court of appeals was that its judges wrote too much. The old opinions were short and to the point; the

* It continues to hold sessions in these places.

new ones, verbose. Some decisions of the circuit-court judges had great fame — as those of New York. In the State library of Kentucky there might be found about one hundred volumes of the reports of the New York courts. Their decisions were among the highest legal authority in the land. By the system of circuit courts, justice was brought to the doors of the people, and the decisions were handed down by the ablest judges in the commonwealth.

The discussion of the relative merits of the two systems did not pass without reference to the power of political organizations in determining the choice of judges. If the elective system was adopted, would the choice of judges really be made by the people? Would not a few active and intriguing politicians manage caucuses and conventions, control political parties in the districts, and thus practically elect the judges? The men nominated to office would be elected by those who made the nominations, because such candidates would inevitably receive the entire vote of their party. They who did the work of nomination would make the judge; not the people, "the mass of the voters," but the political wire-pullers, the active electioneerers, the enterprising, bold, and unscrupulous political managers. By the appointive system the judge felt the sanctity of his office; he withdrew from politics and became a non-combatant in the war for political power; his independence was insured to him by a life-tenure; but when candidates were brought out as Whigs or

as Democrats, and nominated by Whig or Democratic conventions, a nomination was oftentimes equivalent to an election. The nomination was made and determined by the few who defeated just such limitations as one member had proposed, forbidding them to speak from the stump, or to mingle with the people, or to treat their friends. An elective judiciary, therefore, endangered the whole judicial system by transferring it to the control of professional politicians; the people would merely register by their votes their approval or disapproval of the work of the conventions. Such a system gave the election not to the people, but to a political party, and could never secure an independent judiciary composed of men of the highest ability and integrity.

This defence of the appointive system did not convince its opponents. Had the Governor of Kentucky, they inquired, more discernment, purity, and intelligence than half the voting population of the State? The people would reward merit where they found it. They combined all the requirements of an efficient and desirable appointive power. They were eminently qualified to judge of the talents, the virtues, and the qualifications of men high in office. It had been said that there was a difference between political and judicial office, that the people were sufficiently qualified to elect members of the Legislature and of Congress or a Governor, but wholly incompetent to elect a judge. Was this in conformity with the facts? If any good farmer was

asked who was the most successful, most honest, and best lawyer practising at the bar in his county, in nine cases out of ten he would not only give a satisfactory, but a correct answer. Did not the great body of the people of the State attend the county courts, especially when exciting and important cases were on trial? There they heard lawyers, arrayed on both sides, address the court and the jury. There they heard judges and lawyers converse on the standing of members of the bar. These things being so, how could the people be at a loss to know who of the eminent men at the bar were best qualified to discharge the duties of a judge? Had common-sense left the world and taken up its abode with office-holders only? Certainly the electors would know more about the lawyers of the district than could the Governor, as his knowledge was obtained only indirectly. When an office was to be filled, they who desired it might be seen riding over the country procuring letters and recommendations to the executive, and generally without these he would know little about the relative qualifications of the aspirants.

It was urged as an irremediable objection to the elective judiciary that it was corruptible by money. What security existed against the corruption by money in the choice of the executive or of a member of Congress? Could the people be bought and sold when a judge was to be elected and be beyond price when the Governor was to be chosen? Again, it had been said that no judi-

ciary could be independent that was not appointed; but this objection was founded not upon the principle at the basis of American institutions, but on English precedent. Government in America differed from all other governments chiefly in two respects. In other countries the theory of government originated with the executive, and this power appointed the officers who were to administer it; in America the theory originated with the people, and they chose their public servants and prescribed their duties. Again, in America the theory was written in constitutions, by which government was divided into different departments, and to each a function was assigned. These departments were equal in rank, and each alike derived its powers from the people. The authority which chose the officers of one department should choose the officers of the other, and one should not be increased or decreased at the expense of the other. No method would secure equality between the departments which did not make each dependent upon the will of the people, expressed in a written constitution. The organization of the elective judiciary was not unlike the organization of the legislative. The members of the Lower House were elected for a short period, those of the Upper for a longer one—to prevent hasty legislation. Might not a similar effect be wrought by organizing the judicial system of the State so that the judges of the court of appeals should hold their offices for different periods, a portion of the court retiring at regular in-

tervals? By such a method only a portion of the court would be elected at any one election, and popular excitement could not change the character of the court. It should not be forgotten, too, that annual elections, the popular discussion of all the important questions of government and public policy, and the frequent examination of the character and political principles of our public men, were like high-schools for the dissemination of political information among the people, by which they were enabled to make critical examination of the principles of government and the services of public men. The sessions of the Legislature served a like purpose. These means possessed by the people equipped them to judge wisely of the qualifications of aspirants for office, as well judicial as legislative or executive.

CHAPTER III

THE EXCLUSION OF CLERGYMEN FROM CIVIL OFFICE

But no opinion quoted in this convention had greater influence than Thomas Jefferson's in explanation of the first constitution of Virginia:* "I drafted the constitution annexed to the Notes on Virginia, the infancy of the subject at that moment and our inexperience in self-government occasioning a gross departure from genuine republican canons. In truth, the abuses of monarchy had so filled all the speeches of political men that we imagined everything republican that was not monarchical. We had not yet penetrated to the mother-principle that governments are republican only in proportion as they embody the will of the people and execute it. In England, where judges were named and were removed by the will of the hereditary executive, from which branch most was feared and had flowed, it was a great point gained by fixing them for life, by making them independent of that executive; but in a government founded on the popular will this principle operates in a different direction, and

* Quoted by Francis M. Bristow, a lawyer and a native of Kentucky, representing Todd County.

against that will we have made them independent of the nation itself; and judges of the inferior courts are thus chosen, and for life, and perpetuate their own body in consequence forever. They tax us at will, and fill the office of sheriff, the most important of all the executive offices of the county.* Some men look at constitutions with sanctimonious reference, and deem them, like the ark of the covenant, too sacred to be touched. They ascribe to men of the preceding age more wisdom than human and suppose what they did to be beyond improvement. I know that age well.† I belonged to it and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present, and forty years of experience in government is worth a century of book-reading, and this they would say themselves were they to rise from the dead. Laws and institutions should go hand in hand with the advance of the human mind. Let the office of judges be for four or for six years; this will bring their conduct at regular periods under revision and probation. We have erred on that point by copying England, where certainly it is a great thing to have judges independent of the government. That there should be public functionaries independent of the nation is an aphorism of the republic."

It may be said that Jefferson's ideas have influ-

* This refers more particularly to Virginia in 1776, but was characteristic of all Southern States.

† The period of the Revolution.

enced every constitutional convention that has assembled in this country; indeed, that no other man's ideas have had an equal influence. His notions respecting the executive and the legislative were early applied in the State constitutions. At last the judiciary felt their influence, and the commonwealths slowly abandoned the appointive for the elective system. The change reached Kentucky in 1849. Already its Northern neighbors had adopted the Jeffersonian judiciary. An appointive judiciary cannot long continue in a democracy whose written constitution can be changed with ease at the will of its people. Only the difficulty of amending the Constitution of the United States has saved the federal judiciary from being made elective. Jefferson in vain exhausted all his influence to effect this change. No provision of the national Constitution, in his opinion, was more objectionable than that for the life-tenure of federal judges.* The democracy which evolved in the commonwealths, although Jeffersonian in character, provoked some paradoxical consequences, and none more so than the gradually increasing difficulty of amending the Constitution of the United States so as to conform with the dictates of commonwealth democracy. While one by one the States were abandoning the appointive for the elective judiciary and recording the triumphs of democracy, the relations between the States, and between them and the United States, made it

* See the debates in Congress on the repeal of the judiciary act, 1804.

practically impossible to change the national Constitution as the people with general uniformity were changing the constitutions of the commonwealths.

The presentation of Jefferson's ideas of an elective judiciary greatly reinforced its friends in Kentucky, and undoubtedly carried more weight than any member or group of members on the floor. Nor was it in Kentucky only that his opinions were quoted during the half-century just closing. The debates on the judiciary in Kentucky and the ideas presented in its convention are typical of the debates and ideas relative to slavery and to amendments concerning the judiciary which might have been heard in any of the Southern State conventions, and, except the vigorous defence of slavery, in most of the Northern States.

On the 29th a resolution was introduced suggestive of another abuse of which the American people had long been complaining — the increase of State indebtedness. The Legislature should not be empowered to borrow more than fifty thousand dollars at any one time without the consent of the majority of the voters. The State should be divided into districts of convenient form and equal population, so that representation in the State Senate and in Congress should be as nearly equal as possible. The constitution should be made less rigid, by giving the Legislature power to submit constitutional amendments to the people, which, if approved at two general elections, should become a part of it, but the Legis-

lature should propose only one amendment at any session, and never one giving the General Assembly power to emancipate slaves without the consent of their owners.

It was sought to remedy another evil, already complained of in other commonwealths, by forbidding the Legislature, without the approval of the popular vote, to charter companies with banking or trading powers without requiring each individual stockholder to become liable for all the debts and obligations of the corporation. Another resolution declared it inexpedient to establish a system of common schools, on account of the frequent changes which the improvement in the methods of education required, but the Legislature ought to maintain inviolable the existing common-school fund, and appropriate all the interest arising from it and the special tax levied for educational purposes as might seem most advisable from time to time—an unconscious record of the state of flux in which the school systems of the country were at this time—one, however, quickly giving way to a system of order and permanency, as suggested in the rapidly increasing provisions in the State constitutions for public education, and particularly in the organization of the public-schools under the care of State superintendents. The proposition not to establish a public-school system did not meet with approval. Six days after it was submitted, the Committee on Education reported an article as liberal in its provisions as any then existing in a constitution of a

slave-holding State. It established an efficient system of common schools, open to all the white children of the State. The school fund, consisting of more than one and one-third millions of dollars,* was set apart as a permanent fund. If a county failed to organize common schools for five years, it might nevertheless draw its portion of the school fund, provided it had not already been made a part of the general fund. The superintendents of public instruction should be elected by the people.

Consistent with pro-slavery ideas, the clause in the article in the bill of rights proposed on the 3d of November, which expressed the theory of special compact, included only freemen as capable of forming it. Characteristic of changes in the constitutions of other Southern States were those affecting local government in the counties—especially the one for a more efficient organization of county courts. In Northern States at this time changes affecting local government made a more exact organization of township or town government—the limitation of all local officers, and especially the exemption of the county from liability for the acts of its sheriff. The formulation of local government in State constitutions had scarcely begun as yet, and those formed after 1850 contain the initial changes in this respect.† It was now

* $1,350,491.71, being $1,225,768.42 secured by bonds in the State, $73,500 of stock in the bank of Kentucky, and $51,223.29 balance of interest on the school fund for 1848.

† See Michigan, 1850, *infra*, pp. 183.

proposed to organize a county court, consisting of all the county justices of the peace.* The chief argument for this was its economy; the alternative was the creation of separate county courts. Might not justices of the peace be organized as a county court, with final jurisdiction in civil cases involving an amount to be fixed by law? Moreover, such an organization was in conformity with the Jeffersonian principle of bringing the government home to the people by enabling them freely to participate in it, they themselves assisting in bearing its burdens; thus learning by practice the simple principles at its foundation.

Already in other parts of the Union public opinion had been formulated in the constitutional provision declaring the county sheriff ineligible to succeed himself until a number of years had elapsed. With this provision Kentucky now conformed, partly in compliance "with the great principle of rotation in office," partly because this officer, having intimate fiscal relations with the county, if declared ineligible, would have less temptation to abuse his trust.

On the 8th it was proposed to appoint a committee whose functions should be to determine what powers had been delegated to the Union and what had been prohibited to the States by the national Constitution—a resolution that doubtless had its origin in the general interest in the current discussions on the power of Congress over

* A system adopted in Virginia in 1850.

slavery. How could the State of Kentucky understandingly form a constitution if its federal relations were unknown? Since the foundation of the government had there not been almost continuous disputes as to the powers existing in the federal government and in the States? Had not these shaken the Union and created doubts abroad whether the American people could sustain the principle on which their government was organized? According to the doctrine of one school of statesmen, the powers of the federal government were held by implication and construction. By another school it was believed that the perpetuity of the Union "depended on the adherence to the strict construction of the doctrines laid down in the Constitution." The slavery question was unhinging the hopes of the perpetuity of the national government, and the broad political platform of the Free-soil party had been laid in belief in the implied powers of the general government. At the threshold of its existence was Hamilton, the master-spirit of the doctrine of implied powers, than whom a more intelligent man, or one more honest, pure, and patriotic in motive, never lived; but his talents and his patriotism were perverted by federal doctrines, and his views and opinions of free government were erroneous. Had he not doubted the capacity of the people for free government? Even Washington participated in these doubts, but when called to the executive station he sought to give popular institutions a fair trial. Kentucky was a member of a confederacy, an in-

dependent, sovereign State, knowing and maintaining what properly belonged to her against any power that might make inroads upon her rights. Therefore it was desirable that in the constitution about to be prepared it should be stated, for the benefit of posterity, that they might know, when the conflict came, what position Kentucky would occupy among the confederated States. The clouds already hung heavily in that quarter where jealousy of freedom existed. On the great question that threatened the existence and perpetuity of the Union, Kentucky occupied the position of the key-stone of the federal arch. The State ought to notify the different portions of the confederacy what position it took, in such a way that they might not misunderstand—that they of the North might know that Kentucky was not moved from the position which it occupied in relation to the Constitution of the United States, and they of the South might no longer be jealous of the State.

On the same day a resolution was adopted declaring the people of the commonwealth fully competent to decide upon the qualifications of all candidates for office, whether legislative, executive, judicial, or ministerial. The report, however, was not received with unanimity. One member objected because the committee had incorporated a provision from the old constitution of 1799, that no minister of the gospel should be eligible to a seat in the General Assembly. Such an exclusion not only prescribed the qualifications for the candidate, but it proscribed from any participation in the con-

cerns of government a large, intellectual, and moral class of the community. How could the assertion of the competency of the people to judge of the qualifications of all candidates for office be harmonious with this denial of the privilege of nominating a clergyman? The discussion of the exclusion of clergymen at last called out a memorial from two eminent ministers of Frankfort.* Speaking for the clergy, they did not object to the opinion that, as a matter of practical duty, clergymen ought not to be aspirants for office or mingle in political strife. Not only were they averse to such a course, but they would even vote for the suspension of any clergyman who prostituted the influence of his ministerial character for the promotion of his political ambition. The various sentiments of the different bodies of Christians in the country were expressed in twenty-one of the State constitutions, in which there was no clause excluding clergymen from eligibility to office; such a provision was found only in nine States—Virginia, the Carolinas, Florida, Louisiana, Texas, Tennessee, Missouri, and Kentucky; yet in those twenty-one States there was no more disposition among clergymen to interfere in political matters than in the nine States whose constitutions debarred them from office. Would it fail to occur to reflecting men that such a prohibition in the constitution would be practically inoperative

* Stuart Robinson and George W. Brush; they were among the clergymen who opened the daily sessions of the convention with prayer.

to prevent a perversion of clerical opinions by designing men for the purpose of political promotion? No minister who loved his calling would endanger his influence and reputation by becoming a political candidate; yet there were men whose clerical character sat so loosely upon them as not to check their aspiration for political distinction, and who could very easily qualify themselves for holding office even in a State in which such a constitutional limitation existed. A temporary resignation was sufficient. The practical effect of the exclusion, therefore, was to restrain and exclude only worthy and conscientious men.

There were, however, other reasons against such an exclusion, based upon much higher ground. The exclusion involved principles of civil and religious freedom, and was a violation of the doctrine of equal privileges to all classes. It restrained the people from choosing whom they pleased for office. The real cause of introducing it was the supposed incompatibility of the clerical office with the duties of civil life. This was shown by the language in three of the State constitutions, that "ministers of the gospel, by their profession being dedicated to the service of God and the care of souls, ought not to be diverted from the duties of their office; and, therefore, no minister should be eligible to political office." Even with this reason the exclusion was an invasion of the principle of free government—the principle of non-interference of civil government with matters of religion. The State had no right to define the character and

functions of clergymen. A declaration excluding them from office had no place in the constitution. It was the office of the Church to declare the functions of her ministers. Men who were chosen to make State constitutions were not necessarily qualified to decide justly respecting the proper character and duties of the gospel minister. Did not the history of modern nations teach that it behooves freemen to watch with jealousy any interference of the State with the Church, lest from the slightest beginning the precedent might grow, until designing and unprincipled politicians might corrupt the purity of the Church and make her an instrument of tyranny. Why should one profession be selected as the sole object of constitutional care? Why not as well declare that ministers ought not to engage in farming or in merchandise as to provide that this profession alone ought not to be diverted from the duties of its functions? Was it not equally competent for the constitution to declare that physicians, who had the important care of the lives of men, ought not to be diverted from the duties of their functions, and therefore should not be eligible to political office? Both professions in their purpose were equally unfavorable to this great duty, but the chief objection to the clause was its implied decision by civil authority of the great theological question of the age. The great point of dispute between the Church of Rome and her sympathizers and the Church of the Reformation was involved in the question—Is the minister of religion a priest, peculiarly a sa-

cred person, standing intermediate between God and his offending creatures by the virtue of sacrifice; or is he chiefly a teacher, a propounder of truth, a minister of ordinances in the Church? If the memorialists understood aright, the Church of Rome held the former view, and consistently with this she had for her ministers priests serving at the altar over the sacrifice of the mass and absolving the penitent on confession and penance. Protestant Churches, on the other hand, had for their ministers teachers, as they believed, called by God, chosen by the people to instruct them and to administer ordinances established as signs of spiritual blessings. Of course the ministers of the Protestant Church had not that kind of sacredness of character which necessarily separated the priest from the mass of Christian people, nor did they possess that spiritual power and control over the consciences which the office of priesthood in its very nature conferred. If the minister of religion was a priest, set apart from the mass of Christian people by the sacredness of his office—and by the very nature of his office he had peculiar traits which, it could be shown, were in any way incompatible with political functions—there might then be some good reason for debarring him from civil office. If, however, he was only one of the people set apart for propounding the truth and dispensing the ordinances, with no other influence or power than that of discharging all his duty, clearly there could be no reason for making any distinction between him and other citizens in the privileges of

citizenship. Did it not follow, therefore, that to decide by the constitution of the State that ministers of the gospel were ineligible to political office was to decide the great theological question against Protestants? The cause of complaint was not merely that the decision was against Protestants, but that it was by civil authority.

In an age when statesmen had reason to fear the doctrine that the power of the Church is above all civil authority, it might have been wise, as against the undue influence of the priesthood in the government when priests were the subjects of a power adverse to it; but in an age in which all men treated with derision the claim that the spiritual power was superior to that of civil government, was it not particularly unwise to apply such a prohibition to those teachers of religion whose distinguishing characteristic as a body of men had ever been foremost in the war against the domination of the spiritual over the civil power? Three years before, the convention of New York had stricken such an excluding clause from its constitution as incompatible with the enlightened views of republican government. Would not Kentucky follow this precedent?

In no other constitutional convention is there record of any discussion of the subject. Probably this memorial conveys the sentiment of the clergymen of America at the time. The old jealousy towards ecclesiastics had not yet disappeared in America. Certainly it was more intense along the frontier than in New England or Virginia.

The powerful influence of many sects—Presbyterians, Methodists, and Baptists, chiefly—dominated public opinion in the New England States, and amid this influence there gradually grew up an almost equally strong spirit of toleration; but there lingered, especially in the Southwest, a strong prejudice against the confusion of clerical and political functions. The Kentucky memorial was not wholly free from sectarian influence and sarcasm, but it was received by the convention with dignity and referred in the usual way.

There was no debate on the memorial until the 3d of December, when the Committee on the Legislative reported a provision excluding clergymen, priests, and religious teachers of any society from holding or exercising any office of profit in the commonwealth or in the government of the United States. The memorial then found friends and advocates. The exclusion of clergymen was attacked as being contrary to the "great American principle of equal rights and privileges." No privilege was dearer to the American citizen than the right to worship God according to the dictates of his own conscience. Would not the proposed exclusion violate this right? With what justice could a preacher, priest, or teacher of religion be excluded, while another man who preached deism or atheism was not made equally ineligible? He might teach gambling, or "Fourierism, or Abolitionism, or any other of the thousand and one humbugs of the day, and still be eligible to any office in the gift of the people." The gambler,

the drunkard, the debauchee was preferred to the gospel minister. "Even the bog-trotter of Ireland, the boor of Germany, the serf of Russia, the inhabitant of any country or clime except India or Africa, might become a citizen of Kentucky and eligible to all its offices"; and yet these rights were denied to a virtuous and intelligent class of native-born citizens simply because they served God according to the dictates of their consciences. In the eighteenth century there was some excuse for the exclusion, which was first introduced into an American constitution by Virginia in 1776. Previous to that time the Episcopal Church was established by law in that commonwealth. To support its clergy, certain lands, called glebe lands, were appropriated, and, in addition, an annual stipend of tobacco was voted. Other denominations of Christians sprang up who felt unwilling to support a church to which they did not belong and to whose doctrines they could not subscribe. Persecutions followed, men were whipped and cast into prison, but the union of Church and State was terminated with the organization of the government under the first constitution, and the ministers of all denominations quietly submitted to the new order of things, because the constitution debarred their persecutors from office.

Jefferson, who drafted that constitution, was, it was said, no friend to religion. "He had tasted and felt the influence of the French philosophy, which just then began to lower upon the brow of the moral firmament, and soon after shrouded

in darkest gloom the moral heaven of the civilized world." But the dark cloud of infidelity and atheism had been nearly all brushed away. An excluding clause was unnecessary, because, even if the admission of clergymen into the offices of the State was dangerous, it was evident that they did not covet them. This was proved in the twenty-one States of the Union in which no such prohibition existed. No less to be trusted were the ministers of Kentucky. Why should they be subjected to a suspicion to which their brethren in other commonwealths were not subject? Such a restriction upon ministers was a confession of doubt in the capacity of the people for self-government. Were they not to be trusted in selecting their own representatives? Were they likely to be so false to their own interests as to choose men unworthy and unsafe to manage public affairs? Ministers made no pretension to exclusive sanctity or to the righteousness which some seemed to assign them. They were but men, "common citizens of the State, with no other civil interests than those possessed by their neighbors." The supposed sanctity of the profession was a figure of the Dark Ages. Some argued that to make ministers eligible to civil office was to make a virtual union of Church and State. What tendency to such a union was there in Georgia, in Alabama, in Mississippi, or in Arkansas, in any of the Northern States, or in the government of the United States? Yet in all these States ministers were eligible to office. The union of Church and

State belonged to a condition of society that had passed away. It was everywhere falling into disrepute. In Europe the fires of freedom were consuming it. Not a clergyman in America was friendly to such a union.

But, it was urged, if ministers were eligible to political office the liberties of the people would be endangered. Did not the history of the country prove the contrary? Who had done more for the welfare of America than the clergy? They presided over the foundation of the republic. It was they who induced the Pilgrim Fathers to settle in the wilds of the New World. Was not the first constitution in Christendom which granted to all men the right to worship God according to the dictates of their conscience, drawn by a minister of the gospel, Roger Williams? The old Continental Congress did not class ministers of the gospel with the enemies of liberty. In that honorable assembly of patriots who in 1776 pledged their lives and their honor to maintain the independence of the United States, who was more firm for liberty than Witherspoon, and he subscribed his name to the Declaration of Independence. The convention which formed the federal Constitution—over which Washington presided and in whose deliberations Franklin, Madison, and Randolph participated — did not regard ministers of the gospel as dangerous men. They did not put them under the ban of government. They threw open to them all the offices of the nation. What class of men during the war of the Revolution was

more patriotic, more constant, and more devoted to liberty than the ministers of the gospel? But it was said that almost all the ministers of Kentucky were emancipationists. Granting this to be so, was it to be inferred that the ministry and emancipation were synonymous terms, and that if emancipation was to be prevented by the new constitution of the State it could not be prevented without denying to clergymen the right to hold civil office? Might it not be more easily done "by simply declaring all the emancipationists ineligible"? Nor was it true that nearly all the ministers of the State favored emancipation, but rather "that a greater proportion of lawyers than preachers were emancipationists." Cassius M. Clay, Chancellor Nicholas, and Henry Clay, "the prime movers of emancipation in Kentucky," were not ministers; nor were Garrison, Birney, Hale, and Giddings. But it was said that clergymen had an influence in the community, and that if made eligible to political office they would use this influence so as to endanger the country. So also had every man an influence. Washington, and Taylor,* and every member of the convention had an influence. To this attack it was replied that the history of modern nations taught freemen the necessity of "watching with jealousy any interference of the Church with the State." Designing and ambitious churchmen might corrupt the purity of the Church and render it a fit instrument of tyranny. Therefore, no

* Zachary Taylor, President of the United States, March 4, 1849, to July 9, 1850.

clergymen or clerical teachers should be eligible to a seat in either House of the General Assembly. "Ministers of the gospel by their profession were dedicated to God and the care of souls, and they ought not be diverted from the great duties of their calling." The member admitted that the language in which he spoke was taken from the constitution of the State of Tennessee,* and that in his opinion it expressed "a just and proper definition of the duties, character, and avocation of the Christian minister." He then analyzed the memorial. The convention did not assume the right to declare the duties of ministers. The memorial denied the qualifications of the convention, on account of "the tastes, the views, and the habits of those composing the bodies which framed State constitutions," to define the proper character and duties of the ministry. Was not such a definition already made by a higher power than a constitutional convention? The petition affirmed that ministers were not, more than other Christians, by profession dedicated to the service of God. If this was true, what force had the argument so constantly made by clergymen that they "were called of God"? The memorial declared that the decision of the question of exclusion was a settlement of "the great theological question of the age," and a determination of the dispute between Protestants and the Church of Rome. Did the memorialists imagine that the convention, by ex-

* Constitution of Tennessee, 1834, Art. ix., Sec. 1.

cluding ministers from political office, was deciding the great theological controversy against Protestants? If so, they were deceived. The very language of the memorial implied that Protestants should be made eligible to civil office, but that Romanists should be ineligible. Was not the whole tendency of the memorial an attempt to convince the convention that there was a denomination of clergymen in the State of whom the people should be especially jealous? Was it not evident that the whole purpose of the petition was to secure a permanent discrimination against Roman Catholics. By a vote of seventy-four to seventeen the convention refused to strike out the exclusion, which had existed in the constitution of the State for fifty years.

A reform that was making way in the country at this time was hinted at in a resolution affecting the size of counties. No new ones should be formed having less than three hundred and fifty square miles, nor should any be reduced to less than four hundred; and in running the boundary limits no county line should run nearer than ten miles to the county seat; nor should any new county be created, nor an old one be divided, so as to reduce the number of qualified voters in the county below the ratio of representation. The resolution was specially intended to prevent the multiplication of counties. It was complained that new counties had been organized irregular in form and boundaries. In the organization of counties, the county seat should be located for the

general convenience of the inhabitants. One argument for the branching of the court of appeals had been the promotion of the ends of justice by causing greater convenience to the people of the several counties in the trial of cases. It was asserted that Kentucky had more counties in proportion to its area than any other State in the Union, with the exception of Ohio. New York, with a territory of forty-eight thousand square miles, had but fifty-eight counties; Pennsylvania, with an almost equal area and a population of two millions, had sixty-three; Maryland, with a population of half a million and with more than half the territory of Kentucky, had eleven; Virginia, with an area of sixty-three thousand square miles, had one hundred. The increase of counties had become a matter of common complaint. Ohio, in its new constitution,* provided that no new counties should have less than four hundred square miles. The same unit of measure would have been proposed for Kentucky if the organizing of a few new counties had not been already planned. The relative distribution of the population made it desirable to fix the unit at three hundred and fifty square miles. All the eleven new States had inserted provisions in their constitutions fixing the size of counties. Such a provision originated in the demand of the people to prevent the State from being made tributary to the private interests of individuals, who, for selfish purposes, might agitate

* 1850–51.

for a reorganization of the counties. Experience proved it necessary to put a restriction upon the power of the Legislature to create new ones. Every Legislature received numerous petitions for the organization of new counties, which, if granted, would enormously increase the running expenses of the State without any adequate advantage to the people.

Though Kentucky was a slave-holding State, its location on the boundary line between freedom and slavery caused it to depart from the usual course of slave-holding commonwealths in the organization of local government; yet in its departure it did not join the course of the Northern States; it continued to make the county the basis. In the various propositions to make local government more effective, there were none recognizing the county as a body politic, none subdividing the county into townships. The civil organization was of the State, of the county, of the city or town; the township, as found throughout the Northern States, did not exist in Kentucky. The county and district offices, which from time to time were discussed in the convention, were chiefly judicial. Thus, on the 9th it was proposed to give to any county or city, which had separate representation in either or both Houses of the General Assembly, the privilege of separate municipal courts and officers, but their courts might be held in public buildings owned in common.

The argument for the organization of county and district courts was the same as that offered in

other States for the recognition of local government. The interests of the city were distinct from those of the county, and for this reason Kentucky allowed municipal representation in the Legislature. It gave to the city of Louisville a chancery and a municipal court. In the Northern States there was usually no recognition of the right of the city to separate representation in the Legislature, but the right was admitted in Kentucky, in Virginia, and in Maryland. Further than this recognition of local government in representation, Kentucky, like other Southern States, was unwilling to go. In conformity with this idea of representation, it was proposed, on the 9th, to empower the Legislature to grant separate representation in both Houses of the General Assembly to any city or town having the number of qualified voters equal to the ratio at the time existing in the commonwealth. The confusion of city and county interests, however, tended to increase the difficulty in providing city courts distinct from county courts. It was feared that the city population would soon control the State. Again did the convention illustrate the rivalry between rural and city interests, such as was illustrated in Louisiana in 1845. Should not some provision be made in the Kentucky constitution that would prevent the cities springing up along the Ohio from controlling the agricultural population of the State? It was the agricultural interest that should control the legislation of the country. By strengthening the influence of this interest, the

dominating power of cities such as existed in the State of New York might be avoided. The policy of States controlled by large cities was as shifting as the wind. Was not this true of the State of New York, of which it was said, "As goes the city of New York, so goes the Empire State"? To prevent the domination of the State by its cities, representation should not be based exclusively on population; those living within the limits of the cities should not have power to levy taxes upon the commonwealth and to disburse its revenue.

It was this jealousy between city and country which intensified the demand for separate county courts. Might not the prevailing system of taxation be improved if taxes should be laid, not by the Legislature, but by a commission that should equitably consider the property interests of the whole commonwealth? In Kentucky the jealousy between town and country was chiefly between the city of Louisville and the people of Jefferson County, in which it was located. In spite of the principle that taxation should go hand in hand with representation, Jefferson County had been taxed, not according to its own population and its own representation, but according to the representation of the city of Louisville. By law, the county of Jefferson imposed its taxes and disbursed its revenues by means of its own officers. But was it expedient to have two county courts, with their several staffs, and two county sheriffs in Jefferson County? Would not such an

organization produce inexorable confusion? Such a localization of judicial interests could be effected only by dividing the county, which would mean the organizing of the city of Louisville as a separate county. In face of the probably vast increase in the administration of the government, the convention refused, by a vote of more than two to one, to invest towns and cities entitled by population to separate representation with power to have separate municipal government and separate courts.

On the 10th the Committee on the State Executive reported things new and old. The principal new provision made the Governor ineligible for the term succeeding his own, a precedent destined to be adopted in many later State constitutions.* The office was made incompatible not only with that of member of Congress or of any person holding federal office, but also with that of minister of any religious society. A slight limitation was made of the pardoning power, by requiring the Governor to enter in the records of the Secretary of the State his reasons for granting pardons, subject to the call of the General Assembly. This became one of the characteristic restrictions of the period. The Governor was stripped of the power of appointing judges, which had been exercised by the Governors of Kentucky for more than half a century—or, as was said later, "a portion of his power was returned to the people"—but he was still to appoint the Secretary of State.

* As in Pennsylvania in 1873.

The report on the judiciary, made at the same time, contained greater innovations. It changed the judicial system from appointive to elective, and provided for the division of the State by the General Assembly into four districts, as nearly equal in voting population as possible, in each of which the voters should elect one judge of the court of appeals. The judges, however, were not to be elected for equal terms at the first election, but one should be chosen to serve for two years, one for four, one for six, and one for eight. This popular election did not decide the distribution of the terms; the judges determined this by lot. The judge having the shortest term should be styled the chief justice.* After the first election the judges should be chosen for eight years. The clerk of the court of appeals should likewise be chosen by the people. Judges and clerks of this court were required to be citizens of the United States. The Legislature should further divide the State into twelve judicial districts, "having due regard to business, territory, and population"; but no county should be divided. In each a circuit judge should be elected. He was required to be a citizen of the United States, and, like the judge of the court of appeals, to be a lawyer of eight years' practice; but in determining this qualification the time which a circuit-court judge had served upon the bench of any court of record might be

* A similar provision was adopted in 1850 in Pennsylvania by constitutional amendment.

added to the time during which he had practised law. He was to be elected for six years, and was to be commissioned by the Governor. The judges in either of these courts might be removed from office—those of the court of appeals by the Governor, on the address of two-thirds of each House; those of the circuit court "by a resolution of the General Assembly passed by two-thirds of each House." A third set, comprising the principal change made by this convention, were the county courts, whose judges were to be elected for four years by the voters in each county. The court was to consist of a presiding judge and of two associate judges, any two of whom might constitute the court. The judge of this court was required to be a citizen of the United States, at least twenty-one years of age, but he was not required to be learned in the law. At the same time, and for the same term, the electors should choose two justices of the peace in each district. The method of removing judges of the county courts and justices of the peace was left to be determined by law.

The discussion of the proposed legislative organization disclosed some phases further characteristic of public opinion. Already the State constitutions had freely responded to the general demand for less frequent sessions of the Legislature, but the Kentucky convention refused to try the experiment of triennial sessions.

By the constitution of 1792 the elections had occurred on the first Monday in May, but this

date was changed in the constitution of 1799 to the first Monday in August, for the reason, as stated by Felix Grundy, that the people who had to travel a great distance to vote were unable to cross the streams in May, when the waters were high and there being few bridges in 1792. Some objection was made to Monday, as tending to cause the desecration of the Sabbath-day. Ought it not to be changed to Thursday, to enable candidates to avoid "making arrangements on Sunday"? Hardin assured the members that whether elections were held on Monday or Thursday, there would be an equal amount of Sabbath-breaking. Grey favored Tuesday, as the day fixed for the election of the President of the United States, and because there was a great propriety in having all elections on the same day. Rudd objected to any change from Monday, because it had been the custom of the State for half a century to begin its elections on Monday — election day in Kentucky being "a great political Sabbath, and one that should be well observed." McHenry favored Monday because many young men, laboring at a distance from home, and especially in the season of the year when elections occurred, would desire to vote; if the precinct were small they would find it of great convenience to be at home on the Sabbath and to vote in their precincts on Monday. It would be very inconvenient for them to leave their labor and travel a distance of fifteen or twenty miles to vote and return. Talbott objected to Monday, because on the preceding

Sunday candidates and politicians who had no religious scruples would band their men, organize their parties, and arrange for the next day. The Sabbath would be desecrated by drinking and electioneering; congregations would be disturbed, and otherwise sober and sensible young men would be decoyed to groggeries for their political training and seduction; their votes would be obtained by bribery, and they would be kept together drinking until the next day. At this time in Kentucky elections were held for three days—on the first Monday, Tuesday, and Wednesday of August. One of the reforms proposed was to have all the elections on the same day. Indeed, until a third of the nineteenth century had passed, elections continued for three days in many of the States, especially in the South. The Northern States were the first to adopt one day for elections; in the Southern States, where the means of travel were less expeditious, the reform proceeded more slowly. The day finally agreed on in Kentucky was the first Monday in August.

The strife between city and country was renewed in the effort to apportion representation. It was proposed to divide the counties into convenient precincts, which meant practically to adopt a ratio of representation, and to invest any city or town having the number of voters fixed by the ratio with the right of separate representation; but no city or town, together with the county in which it was situated, should be entitled to more than two Senators; nor should the unincorporated

cities of the commonwealth, in the aggregate, be entitled to more than one-fourth of the membership of the Senate—an effort to restrict the influence of cities such as was successfully made in Louisiana five years before, and one which was destined to dominate those States in the Union having a large city population. The recent debates in the Louisiana convention had exhausted this subject, and the constitution of Louisiana of 1845 was cited as a proper precedent for Kentucky.

The friends of municipal interests asserted that the cities of Kentucky already paid more than their proportion of taxes, and yet did not enjoy their due share of representation. The city of Louisville, in the county of Jefferson, had one-tenth of all the taxable property in the State, and the citizens of that county paid one-tenth of all the State taxes, but they had only one-thirty-third of the representation in the Lower House and but one-thirty-eighth in the Upper. What would be the inevitable effect of this disfranchisement of cities? Would it not precipitate further agitation of the slavery question? The friends of slavery, however, defended it because it excluded foreigners from the State. In the cities many men of foreign birth were largely interested in business enterprises. They paid their proportion of the public taxes. Should such burdens be imposed on them, and they at the same time be refused the right of suffrage? Would not such a policy prove fatal to the State? Thus proscribed,

these worthy men would have the sympathy of the best people of the commonwealth, and there would be a united voice in favor of rejecting the constitution about to be proposed. If the cities were to be the object of discrimination in the apportionment of representation, foreigners would be practically excluded from Kentucky, because it was to the cities and not to the country that they were attracted. They had free access to the privileges of citizenship in other States, especially across the Ohio. If foreigners were excluded from the State, Kentucky would place herself at a great disadvantage, and would contribute directly to the prosperity of her neighbors. New York, by her recent constitution,* had declared the broad principle that numbers only should be the basis of representation. Some maintained that the counties of Kentucky were like the States "of this confederacy." Delaware and New York had each two Senators, and therefore no county should have more than two members in the Upper House. But were the counties of the State sovereign bodies? Should a small county have the same representation as a more populous one? Neither New York nor Massachusetts—States having large cities—proscribed their city population. The convention then plunged into a discussion of representation, and proceeded to repeat nearly all the arguments heard on the subject in the various conventions of the half-century. Should not representation be according to

* 1846

federal principles? Already the Southern States were helpless when compared with the rest of the Union. If it were not for the federal provision for representation, the institution of slavery would be swept out of existence. It was this provision which prevented the South from throwing itself "into a rebellious or revolutionary attitude against the balance of the Union." The argument that the federal principle would not apply to Kentucky would not bear investigation. Had it not been long contended that the Senate of the United States was the savior of the Union? Had it not been long contended that the extension of the area of slavery was necessary to keep up the balance of power? The voting population of Kentucky was rapidly increasing, not in the interior or along the southern borders or in the mountainous regions of the State, but along the northern frontier bordering upon the free States, into which region a foreign population was pouring. Against this increase the State should guard, not by excluding foreigners from the rights which they might legitimately enjoy, but by such provisions affecting representation as would keep the balance-wheel of government in place. But the balance-wheel in the machinery of State government would not be kept in place if the control of public affairs was to be handed over to the cities. The population of Louisville, the largest city in the State, was already about fifty thousand. It was a fluctuating population, and could be increased at will for almost any purpose. On the contrary, within the

interior of the State the people were permanently located, their pursuits were agricultural; wealth and population were there more equally distributed than in the cities.

CHAPTER IV

LEGISLATIVE APPORTIONMENT

In order to equalize representation, it was then proposed to fix the membership of the two Houses. To this idea there was opposition. Hardin proposed that one Senator be allowed to any city or town having the ratio of voters entitled to elect a Senator, but that the city or town in no event should have more than five Representatives and one Senator. His proposed limitation of municipal influence was a compromise between the federal basis and the basis of representation apportioned to population. The proposition to discriminate in representation soon called forth a defence of universal suffrage characteristic of the times. Any discrimination in the suffrage would be political injustice. It had been said that slavery would not be secure if the principle of universal suffrage was carried out, but in reply to this it was said that three-fourths of the votes cast for the members of the convention from the city of Louisville were cast by men who owned no slaves — almost a repetition of language used five years before in Louisiana respecting the delegates from New Orleans; yet no member pointed out the real cause of this—that the city of Louis-

ville, like the city of New Orleans, was a manufacturing centre, and that slavery could not profitably be maintained among a people whose chief interests were manufacturing. But defenders of a system of representation based on population were not lacking. If there were fifty thousand people in Louisiana, there were nearly a million in other parts of the State. Was it probable that the city would control the State? If the Senate was to be composed of thirty-eight members and the equities of representation were to be followed, the ratio of Senatorial representation would be thirty-six and one-tenth for the State, and one and nine-tenths for Louisville. If the population of the city and the remaining portions of the State continued to increase in the proportion of recent years, until the population of the State was two millions and the population of Louisville two hundred thousand—a number which it was thought the State would not have within the century—the relative weight of influence of the State and the city would be thirty-four and two-tenths against three and eight-tenths.* Nor was it probable that the cities of Louisville, Covington, and Newport would combine their interests; more probably they would be competitors. Was not the one great object of human government to protect the minority from the encroachments of the majority?† Would this principle prevail if representation

* Population of Kentucky, 1890, 1,590,462; of Louisville, 161,129.

† Compare Jefferson's Manual of Parliamentary Practice, Sec.

should not be apportioned according to population? But the advocates of a system of representation which would restrict the influence of cities again cited as a precedent the constitution of New York of 1846, by which the city of New York was limited to four Senators.

The constitution of Maryland was also cited to show that Baltimore, compared with the State of Maryland, had a larger population than Louisville would have in a hundred years compared with the population of Kentucky. If, therefore, there was any violation of the principle of the equity of representation, there was sufficient precedent for the violation, in New York and in Maryland, as well as in the constitution of Kentucky of 1799. Had not Pennsylvania in her constitution of 1838 given the city of Philadelphia but two Senators, and limited the number permanently to four? Had not Virginia, by the constitution of 1830, divided the State into two great Senatorial districts separated by the Blue Ridge, giving to the eastern nineteen members and to the western but thirteen, although the western district contained the larger number of electors?* Had not South Carolina applied a like restriction by limiting Charleston and the parishes of St. Philip and St. Michael to two out of thirty-seven Senators and to fifteen out of seventy-six

i., in Constitution of the United States; Jefferson's Manual, Rules of the House of Representatives, etc. Washington: Government Printing Office, 1892, p. 107.

* See, for account of first districts in New York, Vol. i., p. 196.

Representatives? If South Carolina had been apportioned according to population, Charleston would have had one-fifth of the representation in both Houses. Had not Louisiana in 1845 limited the representation of the city of New Orleans? Though having one-fifth of the aggregate population of the State, it was given but four Senators and nine Representatives in a General Assembly consisting of thirty-two Senators and from seventy to one hundred Representatives.

As the debate on representation continued, it disclosed the prevailing political ideas of the half-century, nor did the debaters limit themselves to representation in the State. The old distinctions between the Senate and House were breaking down.* This sentiment was expressed by Mitchell, who said that he conceived that the Senators were as much the representatives of the people as were the members of the Lower House—a remark to be interpreted, in connection with the new definition of the basis of government in America—persons, not things. True, the Senators were of greater age, and held their office for a longer period. If it was intended that the Senate should act as a check upon the House, that check was to be found in their greater age and longer term,† and in the larger constituencies which they represented. The Senate of Kentucky could not be compared with the Senate of the United States. The

* See Vol. i., pp. 76, 77.

† See table on p. 409, for qualifications of Senators at this time throughout the Union.

United States government was "a great confederation of States." The United States Senators represented, not the people, but the States "in their sovereign character." The House of Representatives was the popular branch of the national Legislature. It could not be pretended that the counties of Kentucky sustained to each other a relation like that between the States; therefore, no argument could be drawn from the organization of the national Senate to influence the organization of the Senate of Kentucky. If population was not to be made the basis of representation, was that basis to be wealth or territory? If of wealth, those who possessed it would be given exclusive privileges, altogether foreign to American institutions; if of territory, the State should be divided into equal sections without regard to population; if the basis was neither wealth nor territory, nor a mixture of territory, wealth, and population, was it to be made a basis of mere convenience? This would destroy the stability of government. Those who argued for restriction in government had cited the age qualification required of the elector,* but this qualification applied to all electors alike; it was not such a qualification as was proposed—one for the country, another for the town, by which a citizen of a municipality would not have the same rights as a citizen of the country. If it was true that the inhabitants of cities, by reason of their intellectual superiority, had the power to overrule

* For qualifications of electors, see table, pp. 476–479.

all those who dwelt in the rural districts, it would be equally true that they would exercise this control whether or not political power was withheld from them.

The influence of cities is limited. The scope and the trade of Louisville were cut off by St. Louis, by Chicago, by Cincinnati, and indeed, in some degree, by Nashville. Paris might control France; was it probable that Louisville would ever control Kentucky? Moreover, other cities of the State were fast rivalling her in population. The interests of the cities that were springing up along the Ohio were not identical, nor was their population homogeneous. How, then, could the interests of one of them array itself dangerously against those of the remainder of the State? Each city would have its own interest, and it was probable that there would be as much antagonism between the cities of the State as between the State and any one of them. It was just as probable that the population of the northern part of Kentucky would be antagonistic to that of the southern. Might it not be well to follow the lead of Massachusetts and provide against a dangerous increase of the power of any community, by requiring for every additional Representative an increased number of polls over the basis established by law?* Massachusetts arranged its Senatorial districts with reference to the proportion of public taxes paid by

* Constitution of Massachusetts of 1780, Chap. i., Art. ii., Sec. iii. Amended (1836, 1840) by Arts. xii. and xiii., to which reference is here made. Again amended (Art. xxi.) in 1857.

the district, and no district could be so large as to entitle it to more than six Senators. Nor was it true that New York arranged its Senatorial districts exclusively on the basis of population. The constitution of that State provided that the districts should contain as nearly as possible an equal number of inhabitants, and that each should consist of "convenient contiguous territory." If no town could be divided in forming a Senatorial district, the argument that had been drawn from the example of New York was wholly destroyed. It only proved that, in giving the city of New York a fixed number of Senators, an exception had been made to the rule applicable to other towns in the State. By what principle could Kentucky say to a freeman residing within the limits of a city that he was deprived of his political rights because of his residence? Whether residing in the country, city, or town, he was equally a freeman of the commonwealth, and entitled to all the political rights of one. These did not depend upon the portion of the soil of the commonwealth which the freeman might occupy; nor was it just to say to the citizen of the town that he was taxed for the support of the government of the commonwealth in proportion to his estate, and as high as his fellow-citizen who inhabited the rural district, but that he was deprived of political rights because of his residence in the city.

There was a tier of counties in the southwestern part of Kentucky in which there were at least ten free white males to every slave. Might

it not be disadvantageous to the slave-holder if these counties were permitted to have their full and equal representation? Might not some evilly disposed persons do then what as yet they had not been able to accomplish? Might they not excite the population of that portion of the commonwealth and arouse its prejudices, by eloquent appeals from the stump, declaring that the existence of the institution of slavery was oppressive, and call on the population to unite as one man against the slave-holders for the purpose of destroying the tenure by which slave property was held? While guarding slave property against the Northwest, ought it not also be guarded against the Southwest? Perfect security could not be obtained until the basis of representation was limited to the slave-holders themselves. Some had represented that it was only necessary to apply the principle of exclusion to the border counties along the Ohio River; but independently of the population of that portion of the State hostile to slavery, there was a foreign population against which it was necessary to guard. This was the question of Native-Americanism. Some went so far in their pursuit of political fanaticism as to declare that if they possessed the power they would exclude European immigrants from the United States; others would permit them to come, but deny them the privileges of citizenship until after a period of fifteen or twenty years. But were not the members of the Native-American party—which was at the height of its influence at the time of

this convention—chiefly influential in the city of Philadelphia? Were not the principles of this party based on injustice too great to form the basis of a great national or a great State party? The patriots who formed the federal constitution did not leave to federal agents the power to close the door against the immigrant. If immigrants chose to come to America they might come in spite of the government of the State or of the federal government, whether from Ireland, France, Germany, or Hungary.* If the members of any political party hoped to exclude them, they must appeal to a higher power than a State constitutional convention; they must appeal to that power which is competent to change the Constitution of the United States and the laws of Congress. Only one reasonable requirement could be demanded of foreigners — that they be men of orderly habits, satisfying the public authorities that they were capable of becoming citizens of the United States.

The discussion of the apportionment of representation also again illustrated the influence of constitutional provisions in other States. The friends of the popular basis cited thirteen States as sufficient authority for Kentucky.† Each of these based representation upon the number of

* Immigration to the United States from Austria-Hungary began about 1850.

† Texas, 1845; Arkansas, 1836; Michigan, 1837; Florida, 1845; Missouri, 1821; Alabama, 1819; Illinois, 1848; Mississippi, 1832; Indiana, 1816; Ohio, 1802; Tennessee, 1834; New York, 1846; Iowa, 1846.

free white men. The Declaration of Independence was also cited as an authority. Had not Jefferson therein written, as one of the chief causes for declaring American independence, that King George had endeavored to prevent the increase of population of the States, that he had obstructed the laws for the naturalization of foreigners, and that he had refused to pass others to encourage immigration to America? Was not the effort to exclude foreigners from Kentucky contrary to the spirit of the act of Congress of 1802* —"passed in the administration of the great apostle of liberty, Thomas Jefferson"—requiring five years' residence in which to gain American citizenship? Were not the exclusion of foreigners, and the proposed violation of the principle of representation, contrary to the political ideas of all American patriots? To these sentiments it was replied that the people of Kentucky were making

* The title of this famous act of April 14, 1802 (2 Statutes at Large, 153–155), is "An act to establish an uniform rule of naturalization and to repeal the acts heretofore passed on that subject." It cut down the residence requirement from fourteen years, and was the beginning of a liberal political treatment of foreign immigrants. All through the first half of the nineteenth century, constitutional conventions, especially those in new States, and those the majority of whose members were democrats, repeatedly cited this liberal act as evidence of the character of the principles of the Democratic party. It is the act from which was taken the idea, often heard in America, that "the Democratic party enfranchised the white man," and that "the Democratic party is the immigrant's best friend." The act has proved epoch-making and has largely contributed to the rapid settlement of the newer States. Jefferson was its father, and it remains a living force in our civil institutions.

a constitution for themselves, not for the paupers of Europe, nor for renegades from New York or Boston, nor for persons having foreign interests in Kentucky—"Wilmot-proviso politicians." Political power in the State was equally divided between Whigs and Democrats, and these few independents, the Free-soilers, if they chose, could give either party the ascendency, and thus practically elected one-half of the Representatives to the Legislature. Ought this Free-soil party to throw itself into either the Whig or the Democratic scale, and demand a constitution which neither a Whig nor a Democrat could support? The rights of the people of Kentucky, not of those of a few malcontents, were to be protected. Foreigners, who all their lives had lived in slavery and starvation in Europe, opposed slavery when they came to America, and chiefly because they did not understand the institution. Were not the negroes of Kentucky a fine, hardy set of fellows? It did one's heart good to see them on a Sunday, dressed in their best, returning from church, talking and laughing with their wives and children; and they should be kept in their happy condition. Ignorant and degraded foreigners should not be permitted to come into the State and disturb its peace and quiet and expel these poor negroes. Ought the men of Kentucky refuse sympathy for these poor creatures who had nursed them when they were young, and their children since? Why should Kentucky invite foreigners? It certainly could not wish to have a population like that of the city

of New York, in which, though there were many men who were worth half a million, there were a hundred thousand persons who had neither bread to eat nor clothes to wear. On the 17th, a slight modification in the basis of representation was made—doubtless in part suggested from Massachusetts,* in part from Tennessee†—that no city or town should ever be entitled to more than two Senators until its population increased to three hundred thousand, after which it might have no more than three Senators; but in the House representation should always be in proportion to the number of qualified voters.

Another proposition was to organize the House of Representatives with as many members as there were counties in the State, each county being entitled to separate representation. The State could be divided into Senatorial districts, in each of which one Senator should be chosen. Each Representative and each Senator should be entitled to one vote for every one hundred electors in his county or district. This proposition was defended as giving to "every municipality its own separate and independent Representative." The difficulty hitherto existing, it was said, was in the apportionment of representation, "by which the legislative power might be used for party purposes." From a county having more than the ratio of representation the surplus was transferred

* See note on Massachusetts, p. 101.

† Constitution of Tennessee of 1834, Art. ii., Secs. 5, 6; Art. x., Sec 4.

to a county perhaps fifty miles away, to supply its deficiency. The political sentiments of the two counties might be entirely different. The transferred voters were thus without representation; they had no influence in the Legislature. The fractional remainders were known at this time as *floaters*, and no State, as yet, had solved the problem of securing an equitable representation of them. If each county was entitled to send one Representative with as many votes as it had hundreds of electors, would not the fractional-remainder problem be solved? If a county had two thousand voters, its Representative would be empowered to cast twenty votes; if it had two thousand five hundred voters, he could cast twenty-five votes; if it had one thousand voters, ten votes. This method would give to every freeman a voice in the councils of the State; it made thinking men, not property or territory, the basis of representation. By the existing basis of representation the county of Bourbon, with nineteen hundred voters, sent two Representatives to the Senate, while Camel, with twenty-four hundred voters, sent but one; the county of Cadiz, with a thousand voters, sent one member; Hardin, with twenty-one hundred, sent two. The Committee on Representation had reported in favor of a system giving a county additional representation for two-thirds of the ratio, the ratio and two-thirds being required to give two Representatives. The practical effect of the adoption of this system could, however, easily be anticipated. Thirteen counties could be

selected, aggregating thirteen thousand eight hundred voters, who would be entitled to thirteen Representatives; or thirteen counties, with twenty-six thousand five hundred voters, could be selected and be entitled to but thirteen Representatives. In the first group there would be a deficiency of six thousand voters; in the second, a surplus of seven thousand. Thus the smaller counties would be accredited with six thousand "imaginary men," and the system would "politically kill" seven thousand in the larger counties. If the Representative cast one vote for every one hundred electors in his district, each county would have independent representation irrespective of its population. Every county in the State constituted a separate municipality. No two adjoining counties were alike in their interests. On one side of the county boundary the people congregated at one centre to transact their business, to tend to their courts; on the other side, the people gathered at a different centre. Each county desired to have its own representation, and by adopting the system of accumulative representation, jealousy and ill-will between counties might be avoided. Some counties were entitled to two Representatives, and it not infrequently happened that where two were chosen from the same county, one would not reflect the opinions of the constituency. To the accumulative plan it was objected that in application it would be difficult to decide a vote where the ayes and nays were not called. But the defenders of the system replied that in such a case the mem-

bers would have an equal vote. But would not the Legislature be increased to an inordinate size upon the organization of new counties? To this it was replied that the plan would act as a check upon the Legislature, preventing the formation of new counties; that no member would dare curtail the power of his county by cutting off a part of it, and that the system would tend to bind the parts of the county more firmly together.

Another plan was proposed, applying to the county the principle already in force in the aggregate representation of some States. No city or town should be entitled to more than two Senators until its population increased to three hundred thousand, after which it might have three Senators, but no more. In the House of Representatives, however, representation should be in proportion to the number of qualified voters. The constitutions of New York, Maryland, Virginia, Pennsylvania, and Louisiana were cited in support of this scheme. The population of a city could be represented by a smaller number of Representatives than a county, whose inhabitants were scattered over a large surface. The restriction of the influence of cities might not be of much importance in 1850, but it would be of great importance a century later. But the convention showed no disposition to adopt this last plan.*

As the debate developed it was clear that the

* A general survey of representative systems in force from 1800 to 1850 is reserved for the later chapters of this volume: xiii., xiv., and xv.

contest was between the city of Louisville and the remainder of the State. It was just such a contest as that which had arisen between the cities of Boston, New York, Philadelphia, Baltimore, and St. Louis, and the rural districts of the commonwealths in which these cities are located. The contest in Kentucky differed, however, from that in Massachusetts or in New York. In these States slavery did not exist, and the jealousy which it always fostered towards foreigners did not operate to limit municipal influence. In Kentucky this jealousy was the primary cause for denying proportionate representation to Louisville, just as in Louisiana it had been denied to New Orleans.

At last it was resolved to close the debate on representation. Crimination and recrimination had already driven out argument, and hostile feelings might at any moment transform the convention into an uproarious political meeting. All agreed that in some way the State should be districted, that the number of residents in the several districts should be as nearly equal as possible, and that they should be proportionally represented in the Senate; but on the apportionment of representation in the cities and towns, no two members seemed to agree. A portion—indeed a majority—of the members favored the limitation of the influence of cities, so that in the aggregate these should not be allowed to have more than a prescribed portion of the membership of the Senate. On the 19th the convention refused, by a vote of forty-nine to forty-one, to limit this proportion to

one-fourth, but it agreed, by a vote of fifty-six to thirty-four, that whenever a city or town should be entitled to separate representation in either House and to more than one Representative, it should be subdivided by contiguous squares into Representative districts as nearly equal in population as possible, and that one Representative should be elected from each district. In like manner the city should be divided into Senatorial districts whenever it should be entitled to more than one Senator. From each Senatorial district one Senator should be chosen; but no ward or municipal division should be divided in the formation of districts.

On the following day, by a vote of sixty-nine to twenty-three, it was decided that all the free white inhabitants of Kentucky born in the State, or residents of it for a year, aliens excepted, should form the basis of representation. From 1792 to 1800 a free negro may now and then have voted in Kentucky. At least he was not expressly excluded from the franchise by the constitution or the laws. It was asked whether women and children of the white race should now also be excluded. Against their exclusion it was argued that many of them paid taxes, and therefore ought to be represented; but by this it was not meant that the suffrage should be extended to women. If the burden of taxation, however, was to influence the choice of a basis of representation, the free negro ought to be included, as he might be compelled, as well as the white man and the minor

white child, to help support the government of the commonwealth. The consideration of this question led to a debate on the subject of the federal basis—a discussion already familiar in the proceedings of State conventions. In proportion to population, there was a greater number of children in the rural districts than in the cities. The four heaviest slave counties were Christian, Twigg, Todd, and Logan, which gave a voting population of sixty-eight hundred,* and these counties had within their limits children, between the ages of five and sixteen, to the number of eighty-six hundred.† The voting population of the city of Louisville and the county of Jefferson was sixty-seven hundred and thirty-seven, being but fifty-five fewer than that of these four counties; but both Louisville and the county of Jefferson had but seventy-four hundred and sixteen children between the ages of five and sixteen, thus clearly illustrating the fact that the greater number of children were in the rural districts. A similar disparity existed between Louisville and the counties of Simpson, Hart, Allen, and Baron, each of which had a large slave population. The death rate of children in New York City was as six to one compared with the rural population of New York and Massachusetts. It was, therefore, just and right that the principle agreed upon by the framers of the federal Constitution should be adopted in Kentucky. This principle had recent-

* 6792.

† 8677.

ly been incorporated into the constitution of New York, which provided for a decennial census, beginning with the year 1855, and that the Legislature should district the State after every enumeration of the population; each senatorial district should contain as nearly as possible an equal number of inhabitants, excluding aliens and persons of color not taxed.* Kentucky, by adopting this principle, would shield the rural districts from that overshadowing danger which they apprehended from the rapidly increasing power of cities. The principle would be applied by making the basis of representation not the qualified voters, but the white inhabitants. By the previous constitutions of Kentucky, representation had been based on the number of qualified voters in the counties and towns. The proposition to change this basis was, of course, opposed. Those who favored the old basis asserted that the number of qualified voters could as easily be ascertained as the number of white inhabitants. The Pennsylvania constitution of 1838 was quoted in support of the argument. By this constitution a census of the taxable inhabitants was made every seven years, and the Legislature was to apportion Representatives among the several counties and the city of Philadelphia according to this number.† Mississippi in 1832, though providing for an apportionment of representation by the Legislature every eight years, fixed the basis of representation on the

* New York constitution of 1846, Art. iii., Sec. 4.

† Pennsylvania constitution of 1838, Art. i., Sec. 4.

number of free white inhabitants.* Illinois, in 1848, had followed the same principle.† Thus the voting population was not the only basis of representation in the country. Missouri made the basis the number of free white inhabitants.‡ By a vote of three to one it was finally decided that free white inhabitants, excluding aliens, should form the basis of representation in Kentucky. By a majority of thirteen votes the convention refused to limit the representation of a city or county to two Senators; by a majority of nineteen, that the Senatorial districts established from time to time by the Legislature should contain as nearly as might be an equal number of free white males; that no county, town, or city, should form more than one district; and that, when it was necessary to constitute a district of two or more counties, they should be adjoining.

On the 22d, by a vote of three to one, the convention refused to make its members ineligible to any office that might be established under the new constitution until ten years after its ratification; and a like decision has been reached by every State constitutional convention in the country. On the 26th the debate on the judiciary was resumed. A proposition suggested as a means for strengthening the independence of the judiciary by making judges ineligible for a period of one year from the expiration of the term for which they were elected

* Mississippi constitution of 1832, Art. iii., Sec. 9.

† Illinois constitution of 1848, Art. iii., Sec. 8.

‡ Missouri constitution of 1820, Art. i., Secs. 4, 6.

was rejected by a vote of eighty to nine. The discussion disclosed some interesting administrative details. The business of the circuit courts usually occupied from seventy to ninety days. It was well known that the salary of twelve hundred dollars scarcely commanded "second-rate talent at the bar"; that the circuit-court system in Kentucky had degenerated, and that in consequence it was not in good repute. It was now proposed to raise the standard of the circuit-court judiciary by establishing a minimum salary of sixteen hundred dollars, and permitting the Legislature to increase it. There were many lawyers in the State who would rather take an office worth sixteen hundred dollars from their fellow-citizens than one worth sixteen thousand dollars under the federal government. It was believed that the salary of sixteen hundred dollars would attract such men. It would not do to leave the salary wholly to the Legislature, for the members would "hunt popularity at home" by reducing salaries. The business of the four judges of the court of appeals in 1848 amounted to five hundred and seventy-five cases; the circuit-court judges had to decide more than seventeen thousand cases, excluding the cases in the chancery court in Louisville. Each circuit judge would, therefore, have more than fourteen hundred cases; he must suffer the fatigue of travel over a large district, and bear relatively greater expenses than those of the judges of the court of appeals. Was it better to increase the number of judges, or to increase the salary and decrease the number of

judges? By a vote of sixty-four to seven the convention refused to change the number from twelve to fourteen.

It was about this time that a change was made in the sessions of State Legislatures—not alone from annual to biennial, but also by fixing the maximum number of days during which the members might draw pay. During the sixteen years ending with 1849, the Legislature of Kentucky had held sixteen sessions, of which five* averaged seventy-nine days each and eleven averaged sixty. The eighteenth-century idea, that a session of the Legislature should continue without limitation, except that fixing the day of the assembling of the new Legislature, was the product of Revolutionary times. During a war it is necessary that the Legislature be almost constantly in session. It was not until America was on a peace footing—and this was not until about 1833—that a general demand arose for the less frequent meeting and for shorter sessions of the Legislature. The demand was based on the necessity for a decrease in civil expenditures. Perhaps no phase of the evolution of representative government in America is more significant of the course it is taking than the transition from a military to a civil basis, effected by decreasing the frequency and length of legislative sessions.

On the 1st of December a change was made in the administrative offices of the State, by making

* 1836–1840.

elective the auditor of public accounts, the register of the land office, the attorney-general, and "such other officers of a public nature" as might be necessary. The change from the appointive to the elective system in the administrative department was thus made to conform with that in the executive, legislative, and the judiciary—a change characteristic of the half-century. Already the abuse of public credit in most of the States had led to the limitation of the power of the Legislature to create indebtedness beyond a fixed amount, except in particular cases, and also to the limitation of the debt-creating power of local governments. On the 4th, the convention provided for fiscal reform by making it obligatory upon the General Assembly at its first session to set apart an annual sum of at least fifty thousand dollars of the public revenue as the sinking-fund of the State, with which to pay the interest and the principal of its debts. The proposition passed, however, in an amended form — that the Legislature should from time to time "sacredly set apart" a sinking-fund, to be applied to the payment of the interest and principal of the State debt, and for no other purpose.*

The debt of Kentucky at this time was four millions and a half.† The bank stock owned by the State had a face value of twelve hundred and

* For an account of the growth of the idea that the power of the Legislature should be limited, see Chaps. viii. and xiv.

† $4,497,152.81 ; this was exclusive of the debt to the school fund.

seventy thousand dollars, and it was supposed that the banks would pay this debt dollar for dollar. The State was, however, further indebted, in the sum of one and one-third millions of dollars, to the public schools. It had expended more than two and one-half millions on the thirty turnpikes of the State, and nearly one-third of a million on three railroads.* It was necessary to restrict the power of the Legislature so that it might not involve the people in debt. Another period of distress might occur like that of 1840, when the State found it necessary to borrow money to save itself from repudiation. At that time no State in the Union had such a restriction on its Legislature as that now proposed. The aggregate indebtedness of the commonwealths at that time amounted to about two hundred and forty millions of dollars, "and nearly every one of them repudiated its debt, or was on the verge of that disgrace."† The State of Kentucky at that time, under the general depreciation of property and great failure in the revenues, was saved from the bankruptcy which threatened it only by "plundering the school fund." The Legislature had set apart the sum of eight hundred and fifty thousand dollars from the portion of the surplus revenue of the United States allotted to the State of Kentucky in 1837. The law setting apart this money provided that, for school purposes, it should be vest-

* For the name and cost of each, see Debates of the Convention, pp. 754, 762–64.

† See Vol. i., pp. 322–335.

ed in profitable stocks. The remainder of the federal surplus was subscribed in stock of the Bank of Kentucky. The Governor was authorized by a special law to borrow one million dollars by an issue of State bonds at five per cent., but being unable to sell these bonds abroad, or thinking them a good investment for the school fund, he had made them payable to the school commissioners to the amount of eight hundred and fifty thousand dollars. The proceeds were applied to internal improvements. During the administration of Governor Letcher,* the Legislature, with a view of reducing the State debt—on paper—ordered the bonds given to the school commissioners to be cancelled; and thus the school fund was blotted out. The bonds of the State had sunk seventy per cent. in the Northern market since the school fund had been perverted. Hardin then remarked that when the government of the United States distributed the surplus of about twenty-eight millions, after the national debt was paid,† Kentucky, having ten Representatives and two Senators, was entitled to twelve parts, and received nearly a million and a half.‡ When the money was received, Kentucky had no school fund, and it was thought expedient and advantageous to create one. The five-per-cent. school bonds had always sold at par, except in

* Robert P. Letcher, 1840–44.

† The act making the distribution took effect after January 1, 1837.

‡ $1,433,756.29.

one instance, when it sold at ninety-eight. The indebtedness of the commonwealth was thus about seven million dollars, on which the annual interest was two hundred and seventy thousand dollars.* The revenue collected in the State had increased from sixty-one thousand four hundred dollars,† in 1829, to four hundred and fifteen thousand in 1849,‡ and the levy for the year ending October 1, 1850, was five hundred and twenty-two thousand.

Throughout the commonwealth—and, indeed, throughout the Union—the people were loudly crying for reform, and demanding that a restriction be put on the power of the Legislature to contract debts. No calamity worse than repudiation could befall the country. The debt should be paid dollar for dollar, and in no way could its payment be secured more certainly than by limiting the power of the Legislature to create debts. It was now proposed to limit the borrowing power of the Legislature to five hundred thousand dollars. It should be remembered, however, that there might be occasional deficits in the revenue, or extraordinary expenses; therefore, some provision should be made for these exceptions. The great part of the indebtedness of the State had been caused by the expenditures for internal improvements from 1825 to 1840, when the people of all the commonwealths were making improvements far in advance of the actual wants of the people.§ The

* $271,289.35. † $61,396.05. ‡ $415,002.20.

§ See Vol. i., Chap. xi.

history of internal improvements in Kentucky was quite like that in Ohio, Indiana, and Illinois.* Into the Western country, during the period of inflation, the first portion of that mighty stream of European immigration was beginning to pour. At once there was a rise in land values, and speculation in land became the principal occupation of the people; but settlers in the interior of the country could not get their produce to market "unless the river was high; and year after year, for want of a freshet, their produce was rotting in the barns on their plantations." The Legislature was asked to make appropriations to increase the navigability of rivers, in confidence that from the increased advantages of navigation the region of country thus improved would increase in value, and that from this the State would derive sufficient additional revenue to pay all the expenses it had incurred. Every important stream in Kentucky was in turn improved. The State had been paying half a million of dollars annually to other States—as "for the lumber of New York and the coal of Pennsylvania." It was the design of those who conducted internal improvements, such as those of the Kentucky rivers, "to reach the coal, iron, and lumber regions of the State," and thus to save the annual sums that the people of Kentucky were giving for the products of the mines and forests of other States, and with the sums thus saved to stimulate the industry of the com-

* Dickens describes these improvements, and shows their effect, both in England and America, in his novel *Martin Chuzzlewit.*

monwealth. When the system of turnpike roads was begun there was but one in the commonwealth, and that was only eleven miles long. The improvements in navigation preceded in time the improvements in turnpikes, and probably these would in turn be succeeded by improvements in railroads. It was preferable for the State to conduct such improvements, because if the general government paid out immense sums for the purpose, through commissioners and officers, they would be distributed in one section of the country in order to increase the power and influence of the general government there, and other portions of the country would be denied a share, in order that they might be punished for their political opinions. For this reason the Constitution of the United States should be strictly construed.

Some members of the convention had been members of the Legislatures which had made the principal appropriation for internal improvements. They defended their legislation.* All agreed with the sentiment expressed by Apperson on the 4th, that debts had been contracted by the Legislature according to the will of the people, and that the public improvements made had increased the aggregate wealth of the State in an almost immeasurable ratio over the amount expended. Members who had participated in that

* The members of the convention of 1850 who had been in the Legislatures that voted these improvements seem, according to the debates and their own accounts, to have supported only those measures which had proved a source of income to the State.

legislation now took part in the debate, and one and all declared their belief that the State debt had been properly created, that the State had been benefited, that its resources were greatly augmented, and that the Legislature had always acted for the best interests of the commonwealth. To make the credit of the State more secure for the future, it was decided on the 4th, by a vote of seventy-two to fifteen, that the General Assembly should not be obliged to submit to the people for approval any act borrowing money to pay any part of the public debt of the commonwealth; nor should it be obligatory upon the Legislature to provide a tax for the payment of the principal and interest of the new debt. With this exception no debt should be created until the act creating it had been approved by a majority of all the electors of the State.

CHAPTER V

THE RIGHTS OF PROPERTY

While this convention was in session, it will be remembered that the great question before the nation was the limitation of slavery by exclusion from the California country. The convention did not let the opportunity pass to express its sentiments on this question. On the 5th a resolution involving this subject, and representing the sentiment not alone of all the slave-holding but also of some of the free States at this time, was introduced. The rights of life and liberty are naturally inherent and inalienable. In order to enjoy them fully, the right of property is intrinsically necessary. This right is secondary only to that of life and liberty, and exists prior to government and independent of it. Government is framed only to protect and secure those rights which a free people can never surrender without becoming slaves. Some of the Northern States of the confederacy from the year 1816 had made war, unjustifiably and unworthily, upon the rights of property secured by the organic and statute laws of the United States and of the several Southern States, and to some extent they had thereby made the tenure of property in slaves insecure. It was the

deliberate sense of the people of Kentucky, expressed by this convention, that Congress had no power to interfere with slavery in the District of Columbia or in the Territories. The passage of the Wilmot proviso by Congress, as a part of any bill to organize a State or Territory, would be a direct and flagrant invasion of the rights of the South, and a violation of the true principle of the federal compact—a submission to which would dishonor the ancient name of Kentucky, and be fruitful of disgrace to the national councils. So long as by the will of the free people of Kentucky slavery existed within its borders, and so long as it continued within any other State of the Union, the right of a citizen to purchase slaves for his own use in another State and bring them to Kentucky could never be abridged.

In defining the oath of office it was decided that the members of the General Assembly, and all officers, executive and judicial, should be required to declare their allegiance to the commonwealth of Kentucky upon oath or affirmation, and further to declare that they had neither given nor accepted a challenge, or fought with any deadly weapon in single combat either within or without the State since the adoption of its new constitution, and furthermore, that during their continuance in office they would not in any way participate in duelling. At once a member arose and moved to strike out the latter portion of the oath, by which the candidate promised not to engage in duelling during his continuance in office. He was

opposed to the first part of the oath because it excluded the offender from the possibility of a pardon. The duellist was selected as the greatest offender of all criminals, one deserving the accusing vengeance of a constitutional provision, while other crimes were left to legislative action. The pardoning power existed in every government, however despotic. If the oath, as defined, was adopted, it would be an interpolation of the criminal law in the constitution. The convention had power to establish a form of government, but it had no power to legislate. Society is pervaded by a high principle of honor, teaching a man to hold his character and reputation dearer than life. Was not duelling "the fairest mode of fighting known"? "Although perfect equality between the parties was unobtainable, duelling more nearly approximated to equality than any other." It was "a high protection to females." Northern papers continually referred to suits brought by women for breach of marriage contracts and for slander. In Kentucky they were very rare. A prodigal young man who might be wholly indifferent to lawsuits might even be kept in check by the fear of bodily chastisement. A certain and effectual punishment was found more advantageous than a greater one, if that greater was remote and contingent—as any punishment must be which depended on the uncertainty of the law. Duelling operated "as a restraint on the bully in high life." In Kentucky no man could succeed in political and private life if he suffered himself to be in-

sulted with impunity. The people never respected a coward. Was it not notorious that the most popular man in the State "would be defeated in the canvass before the people for any public office if he permitted himself to be insulted and did not in some way resent it"? It was not infrequent that a large man, from envy of the superior merits and talents of a rival, would insult him—though the latter were more feeble in body than himself—for the express purpose of "taking his practice from him." Suppose this was carried so far that the stronger robbed and insulted the weaker man, and even spat in his face, would any respectable human being censure the act if the party insulted should challenge and kill his adversary? In this case the challenged party was compelled to resort to deadly weapons. The challenger was acting strictly in self-defence, and did from sheer necessity what nothing else could excuse. That it distressed a good man to kill another in a duel, even under these circumstances, was admitted; but if one permitted himself to be insulted and considered as a coward, he was certain to be miserable. It was better to accept the duel and its consequences. Only in extreme cases, however, was the duel justifiable. The man who fought for revenge was a murderer. Duelling resulted in a saving of human life. In the city of Louisville, whose population numbered fifty thousand, there had been but two deaths from duels during seventy years—the whole period of the city's existence. Where duelling occurred, men did not find it necessary

to carry arms, and consequently those weapons could not be used in cases of sudden quarrel. Seconds must be procured, a challenge sent, and time allowed the challenged party to prepare himself. This gave an opportunity for the intervention of friends, who usually effected a compromise. If the parties had been armed, a street fight would have occurred, and the result would probably have been fatal. As long as public sentiment remained unchanged in Kentucky, duelling could be only suppressed by substituting for it the common practice of carrying arms, and street fighting would be more fatal than duelling. The feeling of honor or chivalry which impels to self-defence was native with the Kentuckian, and neither laws nor constitutions could destroy it. Man is authorized to protect the clothes on his back. Should he not be permitted to protect his honor and his character, his most important interests in life? Until public opinion underwent a material change, no human laws could suppress the practice of duelling, and whenever public opinion no longer required the duel, it would cease of itself. The only remedy must be found in the gradual amelioration of public opinion, strengthened and enforced by an able judiciary, with able prosecutors and upright jurists. Then the duellist who fought for motives of revenge and who killed his adversary would be hanged as a murderer. In a country like Kentucky, with a comparatively sparse population, where the accused was necessarily tried by a jury of his neighbors and friends, it would be impossi-

ble to obtain a verdict of capital punishment for almost any offence—not for want of a proper moral sense in the community, but on account of that sympathy with a neighbor in distress which made it impossible to mete out to an acquaintance or a friend that even-handed justice which would be apportioned to a stranger. For this reason criminal laws could not possibly be as strictly enforced as they were in crowded cities, where jurors were unacquainted with the accused. It was a generally received opinion in Kentucky that every man must mainly rely on his own arm for the protection of his person.

This defence of the code was not suffered to pass unanswered. Though duelling had been customary from the days of David and Goliath, and, as one member said, and with a rather broad and curious construction of the code, "from the days of the Horatii and Curiatii," legislation to suppress it was almost of equal antiquity. By the act of its Legislature of 1812, Kentucky had sought to terminate the practice. The killing of a man in a duel was the most deliberate and malicious description of murder, and the duellist who took the life of his fellow deserved to be hanged. It was an extraordinary idea that duelling was a mode of saving life. It was not necessary that the State should be accursed either with street fights or with duels. Legislation could be devised that would suppress both and oblige men to resort to other means of settling their personal controversies. Formerly, duels were frequent be-

tween men with families dependent upon them, but since the adoption of the law making all parties on the ground, spectators as well as participants, equally responsible in damages to the wife and children of the man slain, not a married man had been engaged in a duel in Kentucky. The risk was too great to incur. The experience of Tennessee,* Louisiana,† Mississippi,‡ and Alabama,§ proved that men could be restrained from duelling by constitutional enactment. If duelling could be suppressed in these commonwealths, could it not also be similarly suppressed in Kentucky? Louisiana utterly disqualified from holding office every man concerned in the duel—from the principals to the spectators. As a result, not a duel had been fought by the citizens of Louisiana since the adoption of the constitution of 1845. Nor because of the prohibition of the duel there had men been slaughtered in public encounter, or had private assassination prevailed to an unusual extent. What was gained by permitting a resort to duelling? If a man outraged and insulted your feelings, should you challenge him and give him an equal chance of killing you in the bargain? It was the bounden duty of the convention, in making the organic law of the State, to disfranchise any man who fought a duel, or was accessory to

* Tennessee constitution of 1834, Art. ix., Sec. 3.

† Louisiana constitution of 1845, Title vi., Art. 130.

‡ Mississippi constitution of 1832, Art. vii., Sec. 2. This clause was the precedent for the provision now proposed for Kentucky.

§ Alabama constitution of 1819, Art. vi., Sec. 3.

one. The proposition to strike out the disqualification was lost by a vote of fifty-six to thirty-two.

It was then agreed to amend the oath by including all members of the bar within the operation of its provisions. It was also agreed to amend it by requiring all officers to take an oath to support the Constitution of the United States as well as that of the State. It was then proposed to extend the prohibition of the section to an individual carrying any concealed deadly weapon except for self-defence. This was opposed, and much for the same reason that the proposition to prevent duelling had been opposed. Would not the prohibition of carrying concealed weapons encourage assassination? If duelling and the right to carry weapons were forbidden, men would secretly effect what they were forbidden to settle openly. In some hands a penknife might be a deadly weapon. Kentucky was the only country in which no man had ever been punished for giving, accepting, or carrying a challenge, or for killing his antagonist in a duel. There the code of honor was illustrated with bloody scenes. The only hope for an adequate remedy was a change in public opinion. The proposition to forbid the carrying of concealed weapons was adopted by a vote of sixty-two to twenty-eight.

On the following day this vote was reconsidered. Proctor objected to a discussion of matters which the convention was not elected to discuss. Under the old constitution the Legislature had ample power to carry out the spirit of

the constitution respecting duelling and the carrying of concealed weapons. It was quite too much a matter of mere detail to include such clauses in the fundamental law. The people of Kentucky would send a man to Congress, where he might meet with men from other States in the Union, many of whom would be aware that a provision forbidding duelling existed in the constitution of Kentucky. Knowing that the Kentucky member's hands were tied by this provision, would they not seek every opportunity to insult him? He would not be placed upon an equal footing with the members from other States. To this Hardin replied that if the amendment was adopted, all that would be necessary when a duel was sought by one party would be to send word to the other that he wished him to go into Indiana, or elsewhere out of Kentucky, in order that he might send him a particular communication; when received there, the communication would be a challenge. Merriweather objected because the provision would be confined to Kentucky alone. The convention had not assembled to control public opinion, but to frame a constitution in accordance with it. "But," said Hardin, "public opinion is sickly upon this subject." Stevenson objected to the proposition because, if it prevailed, the constitution would prove as ineffective as the statutes. The duel might be fought in Ohio, and afterwards the antagonists might return to Kentucky. Already there was a statute that a lawyer, while practising at the bar, should not send a challenge

nor fight a duel in Kentucky, but he had to give up his practice only until the Legislature released him from the effect of the statute. Yet the convention should reprobate the practice of duelling, even if public opinion did not demand its abolition. By a vote of fifty-eight to thirty-four the amended section was passed requiring the members of the General Assembly, all public officers, and members of the bar, before entering upon their duties, to swear allegiance to the Constitution of the United States and to the constitution of Kentucky; and also to swear or affirm that since the adoption of the constitution they had not fought a duel with deadly weapons with a citizen of the State, within or without its borders, or had assisted in a duel in any way. The provision forbidding the carrying of concealed weapons was rejected.

The definition of treason contained in the Constitution of the United States* was incorporated in the new constitution. Persons guilty of bribery, perjury, forgery, and other high crimes and misdemeanors, were declared ineligible to office and were disfranchised. Elections in Kentucky had always been *viva voce*. It was proposed now to adopt the ballot, but the proposition was lost by a vote of sixty-eight to twenty-two; however, it was agreed that dumb persons entitled to the franchise might vote by ballot. Members of Congress and all federal officers were made ineligible to the Gen-

* Art. iii., Sec. 3.

eral Assembly, or to hold any office of trust or profit created by its authority. The city of Frankfort was declared the capital of the State, and the seat of government could not be removed unless two-thirds of all the members elected to each House of the General Assembly should concur in the law for removal.

On the 6th the convention was again precipitated into a discussion of slavery. It was proposed to include in the new constitution a provision that the right of property was before and higher than any constitutional sanction, and that, therefore, the right of the owner of a slave to this kind of property was the same and as inviolable as his right to any other property; but there was no extended debate on the subject. Why should the chief axiom of slaveocracy be called in question?

On the 7th began the discussion of the scope and method of taxation. It should be equal and uniform throughout the State, but the General Assembly should be empowered to levy taxes on specific articles, on particular occupations, on licenses, and on franchises. Incorporated cities and towns should be empowered to levy taxes for county and corporate purposes, on the principle regulating State taxes, but a poll-tax might also be assessed for county and for corporate purposes. It was also proposed to assess the owners of real property in cities and towns for the expenses of grading and paving streets and for digging and walling wells. Hitherto in the State there had

been specific taxes aggregating fourteen thousand dollars a year on carriages, buggies, pianos, gold spectacles, and gold or silver watches. The State also derived a revenue by taxation from the Northern Bank of Kentucky, from the Bank of Kentucky, from the Louisville Bank, from the rent of the Lexington and Ohio Railroad, and from the rent accruing from water-powers and turnpike roads. On what principle should taxes be laid? According to the amount of real property owned by the citizen or the amount of his aggregate income, or upon these and upon his personal property also? If the tax was levied upon personal property, it would usually be returned at less than its real value. "A gold watch worth probably five hundred dollars would be returned," said Hardin, "at no more than one hundred, or, at most, one hundred and twenty." The power of specific taxation, he declared, should not be taken from the Legislature; the convention should leave the Legislature free to exercise this power at its discretion. The proposition to tax property-owners for the expenses of paving and grading streets and digging and walling wells was speedily rejected, as was the inhibition upon the General Assembly to pass laws compelling the citizen to pay taxes upon more than the intrinsic worth of his property. The general provision requiring equality and uniformity in taxation and empowering the General Assembly to levy specific taxes, was carried by fifty-two to thirty-eight, and the provision on local taxation was carried unanimously. An amend-

ment empowering the General Assembly to tax bowie-knives, pistols, and incomes was rejected. At the evening session it was proposed to reconsider the vote empowering the Legislature to impose specific taxes. At first this taxation was opposed because it made possible a danger "at a future day of so inordinate a specific taxation on negroes as to render them worthless to their owners." Whatever the emergency, the Legislature ought not to be empowered to impose a specific tax on any property. Such a tax was a matter for public sentiment to control. The fact that the Legislatures of the State had not repealed the laws levying specific taxation was evidence that such a repeal would be against public sentiment. Again, it was said that if the Legislature could not levy specific taxes, the inhibition would prevent the specific taxation known as assessments in cities, by which method only could a system of public improvements be carried on. Such assessments should be a graduation of the taxation upon the owners of property in proportion to the benefits derived. If assessments of this kind could not be made, the cities of Kentucky would not prosper like the cities of other commonwealths. To these assertions it was replied that a fixed principle of taxation should govern the Legislature. Would it not be a strange proposition to put forth to the people to say that there were only two kinds of property—land and negroes—upon which taxation should be equal and uniform? A specific tax was ultimately a tax on the people. A tax on

peddlers and merchants was paid by the people in the higher price which the merchant charged for his articles. It was a mistake to think that city improvements could not be carried on by general taxation. True, some kinds of property would derive greater benefit from these improvements than others, and for this reason an exception should be made to meet particular cases. Marshall* objected to giving cities and towns a power that was not necessary to their prosperity. The municipal power to levy specific taxes, in one instance, had already compelled a citizen to pay more for the opening of a street than his lot, which it was supposed to benefit, was worth. The motion to reconsider was carried by seventy-five to sixteen.

It was then moved to deny to the Legislature the power to levy any other than *ad valorem* taxes on land or slaves, or a higher tax on slaves in proportion to their value than on land; but a poll-tax might be assessed on slaves for county and corporate purposes. The great object which the convention had in view, said the mover of this proposition, was to protect slave property from excessive taxation, and there could be no difficulty in effecting this if land and slave property were linked together. All other subjects might well be left in the hands of the Legislature. To this it was replied that slaves and land were alike property, and that they should be taxed equally, but that the

* Alexander K. Marshall, representing Jessamine County.

equality between them was abstract rather than real. Out of the institution of slavery sprang risks and expenses of a peculiar kind, which ought not to be defrayed by the community at large, but be met by that particular interest on account of which the risk was incurred and but for which there would be none. For this reason the constitution should protect slavery, not only from all sources of danger, but from becoming a source of expense to other interests in the State. Was not the whole subject of slavery a matter of deeper feeling and of greater excitement than any other property in the State? The people of Kentucky knew their land to be stable and safe; they felt that their slaves were not. The safety of slave property depended, as did all property, upon a well-ordered public sentiment. That sentiment in Kentucky favored the institution. Citizens of the State who were not slave-holders were disposed to protect slave property, because the laws of the State recognized slavery, and under these laws many citizens had invested their money in it; yet the non-slave-holders of the State were not inclined to protect the slave-holder in the enjoyment of his peculiar property at the expense of their own. Therefore, should not the constitution provide that all expenses which the commonwealth might incur for the protection of slavery should be assessed by specific taxation on slave property? But if a slave were executed, should the expense of his execution be borne solely by those who owned slaves? The member who favored a specific tax on slave prop-

erty was himself a slave-owner.* His plantation was located in a county on the northern border. The border was in a disturbed condition, stretching, as it did, along a river front of nearly eight hundred miles, facing three free States and coterminous with them. Beyond the Ohio were many opponents of slavery, who were constantly inciting the slaves of Kentucky to leave their masters, and thus were making slave property hard to hold. If this state of things continued, the burden would become intolerable to the slaveholders throughout this border region. Then would be suggested a coast-guard, and the government of the State would feel the necessity of organizing an armed police to protect those citizens of Kentucky and their property against the subtle and energetic efforts of the frenzied Abolitionists. No man could estimate the expense of this protection. The border counties in the northern part of the State were holding their slaves by a tenure so frail that it only needed the will and the knowledge of the slave not merely to break his fetters, but to glide away from them. Was the convention prepared to say that the lands and other interests of the commonwealth should be taxed to support a standing army for the protection of slavery? Five-sevenths of the population of the State owned no slaves, and the remainder "trembled under the rod of this convention for the security of this property." Because the right of vested interests in

* M. P. Marshall, representing Fleming County.

slave property was recognized by the majority of the people of the State, the non-slave-holding portion of its population had surrendered the convention to the control of the slave-holding interests.

The people of the State had elected a pro-slavery convention merely because of their sense of justice and honor, and their respect for the right in property peculiar in kind—"feeble and comparatively limited as to the number interested." As the question stood in the sweeping tendency of the times, could higher evidence be found of a sense of justice and honor which compelled the submission of power to right than was furnished by the composition of the convention? It should not be imagined, therefore, that the people of Kentucky believed slavery to be a blessing. Not an intelligent member of the convention believed so. With few exceptions, all believed it to be a social and political evil. If the question of the introduction of slavery was an open one, few members of the convention would impose it upon Kentucky. Therefore, as the people of the commonwealth had generously surrendered to the minority all control over the subject, would it not be an ungrateful return if the convention failed to provide that the institution should sustain itself? But was it not likely to force still greater expenses upon the country? The expenses of executing slaves had hitherto been light, and an *ad valorem* taxation had been sufficient to pay for all such cases of capital punishment; but if the institution, by the influence

of the fanatic and frenzied Abolitionists, or through the mistaken enthusiasm and awakened hope of the slave himself, should bring on the horrors of a servile insurrection, there might be a thousand slaves executed in one year. Under the existing law these must be paid for, and in such an emergency a debt would be thrown upon the treasury which it would not be able to sustain. A constitution should be framed for all time to come; therefore all contingencies should be considered. If a slave insurrection should occur, throwing on the treasury an expense of half a million dollars, would it be thought fair to impose a tax upon land as well as negroes to pay the slave-owner for the use of his property? Let no one forget that whenever the institution of slavery, for any cause, became obnoxious to the sentiment of the country, then indeed there would be danger. Whenever injustice should be perpetrated upon other property-holders in order to sustain the institution, then all non-slave-holders would feel themselves absolved from the high obligations which had prevailed when the convention was elected, and the opponents of slavery would feel at perfect liberty to take the subject into their own hands, when they would not deal as tenderly with it as justice might require.

In every part of the country along the northern border the feeling was dominant not to interfere with slave property, and to resist every attempt at emancipation. The people recognized slavery as a moral and social evil, yet they desired it to be left to natural causes to work out

its own destiny, and not to be subjected to legislative enactment. Enlightened as were these owners of slaves along the border, were the question put to them whether in all time to come they would sustain the institution at the expense of the non-slave-holding portion of the community, they would declare that slavery should be made to sustain itself. For this reason a provision should be included in the constitution that owners should be compensated for those of their slaves who were executed. This idea did not imply that a slave, any more than land or other forms of property, should be taken for public use without compensation. The object of the provision was to remove from the master the temptation to carry offenders out of the reach of justice, a temptation which he would have if the expenses accruing should come out of the pockets of slave-holders. The institution of slavery should stand upon its own basis. The permanency and safety of society did not require its introduction, nor was it a necessary element of civilization. On the contrary, the highest grade of civilization known in ancient or modern times was attained where property in men was unknown. The right to such property existed merely as municipal regulations and depended upon them for its existence. The institution should therefore be in consonance with public sentiment, and not be made a burden to those who were not interested in its security.

This bold declaration of the dependence and frailty of slavery was not suffered to pass unchal-

lenged. If the institutions of the State were upon so frail a basis that its citizens were to be alarmed by every brawling demagogue who decried slavery as a great moral and social evil, and who proclaimed that an era of rebellion and insurrection was about to begin, little that the convention could do would strengthen the institution. Slavery gave to the people of Kentucky their wide reputation for chivalry and bravery, intelligence and honor. Slavery worked moral and social good. It had been said that if slavery was abolished the stalwart sons of the North would supply the place of the slaves. The habits of immigrants from that region made them incapable of pursuing the arts or of supporting manufactures. The rapid progress made by Ohio in civilization and wealth could not be attributed to the exclusion of slavery. Not slavery, but the difference between the natural advantages of Ohio and Kentucky, caused this progress. Ohio had lakes on the north and a river on the south, both offering admirable outlets for her produce, affording all the facilities which a country could desire to promote commercial prosperity. On the other hand, Kentucky was an inland and a strictly agricultural State, and was compelled to depend upon her own productions, the only outlet for her surplus being the Ohio, on the northern border. For carrying on their agricultural pursuits, her people depended upon their slaves. Other States built up cities and towns and carried on commerce with every portion of the world, but it was

to the neglect of agriculture. If Kentucky attempted to follow such a course, her lands, estimated to be worth from seven to seven and a half dollars per acre, would not be worth half that amount.

Without slaves the produce of the State would decrease in quantity, lands would fall in value, and the public revenue would sink in equal proportion. The "gentlemen" who came from Europe were not in any way qualified to carry on the great agricultural pursuits of America in the manner in which Americans conducted them. What danger was there from rebellion and servile insurrection? Certainly it did not spring from the relation between the slaves of Kentucky and taxation. Slavery paid seventy thousand dollars a year into the treasury of the State, forty thousand dollars into the treasury of the counties, thirty-five thousand dollars to the sinking-fund, and fourteen thousand dollars to the school fund. Besides these, there was a poll-tax on all slaves over sixteen years of age, and of these there were eighty-nine thousand. Of slaves under that age there were about eleven thousand. The entire tax paid on slaves to the commonwealth of Kentucky amounted to one hundred and seventy-three thousand dollars; nor was this the whole resource from slave property. Every negro over sixteen years of age was compelled to work upon the roads, and the value of this labor alone amounted to more than forty thousand dollars. The entire amount realized from the lands of the State was about two hundred thousand dollars, or thirteen thousand

less than the income derived from slaves. And yet it had been said that if a rebellion should be brought about by the citizens of Kentucky, if they should invite a servile insurrection, if a citizen who owned no slaves should instigate such an outbreak, then the lands, the carriages, the buggies, the watches, and the spectacles belonging to the people of the State were not to be taxed to maintain the general peace—the tax should be derived solely from slave property. What fairness was there in such a proposition? Slaves were kidnapped and taken into Ohio. If the owner followed and attempted to secure his property, should the entire expense fall upon the owners of slaves in Kentucky? The fundamental ground for imposing such a tax was contrary to the principles of the constitution of the State, and also of the Constitution of the United States, both of which guaranteed to the slave-owner the protection of his property. Not alone the inequality of such a tax, but the difficulty of assessing it, argued against it. What difference was there between a horse, a mule, land, a slave, or any other property? The law knew no difference. The law recognized all equally as property. For what reason, then, should one specified property be taxed while another was exempted? There could be no reason other than that slavery was wrong in itself, that it should be denied the protection of the law, that "all idea of property in slaves should be expunged from the constitution, and that all slaves in the country should go free." By what right could a man's

property in a slave be taken from him while land could not be taken for turnpike or railroad purposes without remuneration? Did the five hundred thousand non-slave-holding citizens of Kentucky believe that the tax on negroes could be abolished and their own taxes, at the same time, not be increased? The institution of slavery would exist in Kentucky as long as time should last. It required no guard, no walls. It addressed itself to the intelligence, and the pockets, of the people, and so long as these were appealed to the institution would be secure.

The debate was supposed to be on specific taxation, not on slavery, but the discussion of any subject in a convention held in a slave-holding State usually ended in a discussion of slavery. The chief objection to specific taxation was that it bore more heavily on the poor than on the wealthy. Was this true? The fine carriage of the man of wealth was taxed just the same as the merely convenient article, perhaps worth fifty dollars, belonging to the poor man. If articles of luxury must be taxed, they should be taxed according to their value, and then the burden of taxation would fall equally upon rich and poor. At this point in the debate citations were made from other State constitutions. Tennessee taxed all property according to its value, thus settling the whole principle, and excluding the idea of specific taxation.* Louisiana, in almost the same

* Tennessee constitution of 1834, Art. ii., Sec. 28.

language, made taxes equal and uniform throughout the State, and made all taxes on property *ad valorem*.* Illinois specifically provided that every person should be taxed in proportion to the value of his property. Missouri,† Arkansas,‡ and Texas§ followed the same principle. Kentucky, being an agricultural State, could not depart from it. All farming lands, as they were protected, should be taxed in proportion to their value. Hardin laid down the maxim that in taxation every man should pay according to his means. The income of the county should be called upon to contribute to the support of government. Though the people of Kentucky paid over a million of dollars in customs, it was hardly felt, because it fell on the means of the country, and no man bought unless he could afford to buy. The direct tax for 1849 was five hundred and sixty-two thousand dollars, and it was found to be inconvenient and oppressive. The indirect tax was not felt, because it was paid by those who were able to pay it. It fell on the man who wore the fine coat, not on him who made his own. The tax on tea, coffee, and salt was small, because these articles had become necessaries of life. The power to discriminate between the necessaries and the luxuries of life in assessing taxes should not be taken from the Legislature. The constitution which the convention

* Louisiana constitution of 1845, Title vi., Art. 127.
† Missouri constitution of 1820, Art. xiii., Sec. 19.
‡ Arkansas constitution of 1836, Art. vii. (Revenue), Sec. 2.
§ Texas constitution of 1845, Art. vii., Sec. 27.

was forming, it was hoped, would last "some fifty or a hundred years,"* and it should not tie up the hands of the Legislature. This body should always be empowered to discriminate in taxation, by diversifying the articles taxed, so as to make the burden fall upon the means of the country, and not upon its visible and tangible property. If the Legislature could not distribute the taxes at discretion, but must tax all kinds of property, there could be no exemption of the scientific apparatus of the universities; all the college text-books, all the articles belonging to the schools, must be taxed. There could be no exemption for the poor widow whose property amounted to no more than fifty dollars. The specific tax would fall upon the means of the individual, upon the income of the professional man. If negro property was to be taxed to cover the loss of negroes who absconded, how could Kentucky prevent the citizens of Ohio, Indiana, and Illinois from tampering with her slaves? Block-houses could not be erected along the Ohio. If the emancipationists should induce the negroes to run away, must Kentucky indemnify the loser of a slave five hundred dollars for every negro he lost? A law for such indemnification would be nothing less than an emancipation law. The tax on slave property would be so heavy as to become unsupportable. The man owning slaves would either move with them from the State or sell them, and in either

* It was supplanted by the constitution of 1890.

case, in less than twelve years Kentucky would become a non-slave-holding State—"a consummation devoutly to be wish'd" by the emancipationists. If Kentucky became a non-slave-holding State, the free States in the Union would then have a majority of sixty or seventy members in the House of Representatives, and of four in the Senate. The political consequences of the act would be momentous. The non-slave-holding States would begin, in Congress, a war upon the institution of slavery, so as to compel the slave-holding States either to give up their property or to separate from the other States and dissolve the Union. The Union would be dissolved.

What, then, would be the condition of Kentucky? Would she attach herself to the North or to the South? If she went to the Northern confederacy, a heavy tax would be laid upon all her manufactures, as well as upon the products of her tobacco-planters, cotton-growers, and sugar-makers. Nearly all that Kentucky sold was purchased by the slave-holding States in the South. She could not submit to a heavy duty, and at the same time compete with Tennessee and Missouri when those States paid no duty. Kentucky was the first State formed on the western side of the mountains, and at the time of its formation its products had to be sold to Spanish America. Spain levied a duty of six per cent. upon all products brought within her possessions, and six per cent. duty on all the money brought from them. She also erected two forts, one at Walnut

Hills, the other six miles below Memphis, and all boats ascending or descending the Mississippi were obliged to pay the duty at these forts. At last they became heavy and oppressive, and in 1795, after several years of excitement, the leading men of Kentucky sent Judge Sebastian to Orleans to obtain from the Spanish Governor a reduction of the duties and better terms and conditions in commercial intercourse. The import duty was reduced to four per cent., the export duty was abolished, and the people of Kentucky were given permission to trade with all parts of Spanish America. If the Union was dissolved, Kentucky would not endure discriminating duties; her people would ally themselves with that part of the old Union most favorable to her interests. To compel negro property to pay for its own protection was a discrimination. The service which slavery rendered to Kentucky more than balanced the cost of maintaining the institution. Though New York had increased twenty per cent. in her population by reason of immigration, though Ohio and Pennsylvania had increased in almost equal proportion, they were not examples for Kentucky. European immigrants were not wanted. "I thank God," said Hardin, "that the negroes keep them out of Kentucky, and that the Northern States keep the foreign convicts and paupers generally within their borders." Nor should it be forgotten that there was yet a greater reason for supporting the institution. A slave-holding population was the finest in the world. In a non-slave-holding

country liberty was viewed as a political right, but in a slave-holding country it was valued as a personal privilege. By a vote of fifty to thirty-nine the proposition to levy specific taxes was rejected. By a vote of sixty-five to twenty-three the convention decided that the right of property is before and higher than any constitutional sanction, and, by a vote of seventy-seven to ten, that the right of the owner of a slave to his property and its increase was as inviolable as the right of the owner of any property whatever.

It was then proposed to deny to this convention, or to any that might be assembled by the people of the commonwealth, the right or the power to emancipate either the slaves then within the State or their descendants, also to deny the Legislature the power to pass laws for their emancipation—perhaps the high-water mark in this country of the effort by a commonwealth to perpetuate slavery. The ground for this proposition was the right of property, which no convention could make insecure. That a constitutional convention could thus be limited was an innovation in the history of a slave-holding State. Usually a convention was conceived to be in the place of the sovereign people, and, in application of this idea, the constitution which it made was not submitted to the people for approval, but was promulgated.* In

* As in Kentucky, 1792, 1799; Tennessee, 1796; Louisiana, 1812; South Carolina, 1776, 1778, 1790; Virginia, 1776; Maryland, 1776; Delaware, 1776, 1792, 1831; Georgia, 1776, 1789, 1795, 1798; North Carolina, 1776; Alabama, 1819; Missouri, 1820; Florida, 1838.

order to protect slavery, even a sovereign constitution might be limited. Because the slave was property, critics of the Southern States, in attempting to explain the persistency with which they clung to slavery, not infrequently have shown an incapacity to do the people of the South justice. The right of the slave-holder to his slave was, in the opinion of the South, essentially the same as the right of the Northern freeman to his cow or his horse. An act to emancipate horses and cattle in the North would have been no more startling there than in the South was any proposition to emancipate slaves.

Slavery was bound to continue as long as it was a safe kind of property. It rested entirely upon an economic foundation. Men do not long continue to invest their money in any kind of property in which the elements of security are overbalanced by the elements of danger. John Brown struck the death-blow of slavery when he made it too insecure to be an object of investment. Although slavery was abolished in obedience to an altruistic law—the law of that powerful moral sentiment which ultimately transforms public opinion in this country—yet with the operation of that law there was the working of economic laws by which slave property became less secure. When it ceased to be protected as property, slavery ceased. In conformity with a false interpretation of those economic laws, the Kentucky convention of 1850 sought to make slave property absolutely secure. Not one word was

said of the amelioration of the condition of the person enslaved. As was repeatedly declared, he differed in law from no other kind of personal property. There were a few members of the convention, however, who looked beyond this legal relation. In their opinion slavery could have "but a transitory existence in Kentucky; the general sentiment of the world was against it, and before this sentiment slavery for fifty years had been receding." It was a sentiment deeply and widely formed among the people of the commonwealth. In all the free States it was universal, and existed with such intensity that only by accident henceforth could a fugitive slave be reclaimed from a free State. The climate and the productions of Kentucky did not require slave labor. Different conditions existed in the more Southern States, where there was a great demand for slaves, which must continue until the vacant lands were settled. The insecurity of slave property in Kentucky, the great and continual demand for it in the cotton and the sugar States, the increasing disposition among the people of the State to emancipate their slaves, would continue in ever-increasing force, and in the course of a few generations would remove slavery, in its existing form, from Kentucky—if the institution was left to itself and to the forces operating upon it. This natural remedy for slavery would be more proper, more peaceful, and more effective than any which the meddling interference of the day could apply. The history of sla-

very proved that it was progressing to its end. Admitting it to be the paramount and immutable law of man and of nature that the people of every State may adopt all measures necessary for their self-preservation, human regulations could not control slavery. If the slaves of Kentucky could not be kept there without bringing social disorganization, ruin, and desolation upon the State, was it not better to choose the lesser evil? Therefore, as long as slavery could continue in Kentucky without bringing its white population into eminent danger, no convention, however great the majority in favor of the measure, could rightfully emancipate slaves without making a fair compensation for them; but such a provision at best could be but of a temporary nature.

CHAPTER VI

FREE STATES AND SLAVE STATES CONTRASTED

No argument against slavery advanced in this convention was more persuasive than the citations from the census of 1840 by Woodson, a lawyer representing the counties of Knox and Harland. He did not make his citations directly from the census, but availed himself of Theodore Parker's letter to the people of the United States—an authority which some might think would not be quoted in a constitutional convention of a slave-holding State.* When Ohio was settled, Kentucky had a population of nearly seventy-four thousand (73,677, in 1790), of whom twelve thousand (12,430) were slaves; but in forty years the population of Ohio had increased to a million and a half (1,519,467), while Kentucky had less than eight hundred thousand (779,828), including free negroes — the slave population being one hundred and eighty-two thousand (182,258). A similar difference appeared on contrasting Kentucky with Indiana or Illinois. The effect of slavery was also shown in comparing the wealth of the States. The prop-

* A Letter to the People of the United States Touching the Matter of Slavery. By Theodore Parker. Boston: James Munroe & Company, MDCCCXLVIII.; 120 pages.

erty of Ohio was worth four hundred and twenty millions ($421,067,991), that of Kentucky but two hundred and seventy-three millions ($272,847,-696); and if the value of slaves, computed at four hundred dollars apiece, was deducted, the entire wealth of the State was less than two hundred and twenty-five millions ($224,220,295). Each citizen of Ohio was worth, on an average, two hundred and twenty-six dollars; the citizen of Kentucky, exclusive of his property in slaves, was worth but one hundred and forty-nine dollars. Virginia was larger than New England and possessed a more productive soil and greater natural advantages, yet how great the contrast. The capital employed in Virginia in manufactures was eleven millions ($11,360,861), in New England eighty-six millions ($86,824,229). Virginia had four millions ($4,229,500) employed in foreign trade, New England nearly five times as much ($19,467,-793). In the fisheries, New England had nearly fifteen millions ($14,691,291), Virginia but twenty-eight thousand ($28,383). The banking capital of Virginia was three millions and a half ($3,-637,400), that of New England almost twenty times as much ($62,134,850). The agricultural products of Virginia ($59,085,821) were but little more than two-thirds the value of those of New England ($74,749,889). Nor was the difference between the free and the slave States shown in these two commonwealths only. It was a difference characteristic of the two sections of the country.

The annual productions of the South were valued at about three hundred and twelve millions ($312,380,151), those of the free States at three hundred and forty-two millions ($342,007,446); but this apparent equality ceased when the number of persons engaged in agriculture in the South (1,984,886) was compared with the number engaged in the North (1,735,086). The cotton, the sugar, the rice, and the tobacco exported from the South to foreign countries in one year were valued at seventy-five millions of dollars ($74,866,310, in 1840); but the agricultural products of New York State alone at this time were of the value of more than one hundred and eight millions ($108,275,281)—one free State exceeding in the value of its exports all those of the South by nearly thirty-four millions. The South manufactured articles to the value of forty-two millions ($42,178,184); the free States, articles to nearly five times this amount ($197,658,400). The aggregate earnings of the slave States were four hundred millions ($403,429,718); of the free States, six hundred and fifty millions ($658,705,108). The income of New York alone exceeded by more than four millions the incomes of the Carolinas, Georgia, Alabama, Mississippi, and Louisiana together. The product of free labor exceeded annually, by more than nine millions, the united earnings of South Carolina, Georgia, and Florida. Essex County, in Massachusetts, with a population of less than ninety-five thousand (94,987), produced as much as the entire State of South Carolina, with a

population nearly six times as great (549,398). Ohio possessed double the agricultural wealth of Kentucky. Her wheat and Indian-corn were as valuable as the whole of the products of her slave neighbor on the south. Indeed, all the products of Kentucky exceeded only by one-fourth the value of the hay crop of Ohio.

Nor was the contrast between free soil and slave soil wholly measured by these productions of material wealth. There were, in 1840, in the fifteen slave States, and in Territories having slaves, two hundred thousand scholars attending the various primary schools (201,085). The primary schools in the free States were attended by more than sixteen hundred thousand (1,626,028). In the primary schools of Ohio alone there were seventeen thousand scholars more than in all the slave States (17,524; the total number of scholars attending school in the State was 218,609). South Carolina had twelve thousand five hundred scholars in her schools (12,520), New York had five hundred thousand (502,367). Southern high-schools were attended by thirty-six thousand scholars (35,935), Northern by four hundred and thirty-two thousand (432,388). Virginia, the largest of the slave States, had nine thousand seven hundred and ninety-one scholars in her high-schools; Rhode Island, the smallest of the free States, had ten thousand seven hundred and forty-nine. Massachusetts alone had more than four times (158,351) as many students in her high-schools than had all the slave States. The academies and grammar

schools in the slave States were attended by fifty-three thousand scholars (52,906), those of the free States by ninety-seven thousand (97,174). The free white children between the ages of five and twenty in the slave States (1,368,325) were but little more than one-third of the number in the free States (3,536,686). At the schools and colleges of the North there were in attendance more than two million pupils (2,213,444); in those of the South there were not one-third of a million (301,172). Of twenty-five free white children between the ages of five and twenty in the slave States, five were at school; in the free States, three times this number. One-tenth of the free white population of age in the South could neither read nor write. In the free States but one person in one hundred and fifty-six suffered from this inability. Nor was the census of 1840 the only friend of free institutions; equally friendly were the opinions of patriots and statesmen. Jefferson and Henry, Washington and Mason, Wesley and Wilberforce, Breckinridge and Custis, Pinckney and Monroe had recorded their opinions that slavery was prejudicial to the welfare of the American people.

To these data, and the opinions of these friends of freedom, a member immediately replied that he did not deny the accuracy of the statistics, but he did deny the deductions drawn from them — a denial characteristic of all pro-slavery discussions. That these statistics and these opinions had slight effect on the convention was shown by the rejec-

tion of an amendment recognizing the right of the owner to emancipate his slave, and of another sanctioning compensatory emancipation by the Legislature; but the proposition to deny to the convention, or to any that might afterwards be called, the power to authorize the Legislature to pass laws for emancipation was rejected by a vote of seventy-five to two.

Over-legislation in Kentucky, as in other commonwealths, had produced confusion and contradictions. It was proposed to instruct the first General Assembly under the new constitution to appoint a commission learned in the law to revise and codify the civil and criminal laws of the commonwealth so as to have but one law on any one subject. The revision should be free from technical terms. A similar revision had been effected in Louisiana, and the result was the Livingstone code. A similar revision had been effected in New York. By the New York code, prepared by the authority of the constitution of 1846, many old inconveniences in the law had been removed and many reforms in securing justice had been adopted. The meaningless distinctions between common law and equity had been abolished, and all legal actions had been simplified. Ohio was contemplating codification. By a majority of two votes it was determined to strike out the requirement that the code should be wholly "in plain English"; by a majority of eight the provision for a commission on codification was adopted.

The discussion of slavery was resumed at the

evening session. Its defenders attempted to show that other causes than slavery had retarded the progress of Kentucky as compared with that of Ohio. That slavery did not retard population was evident from the increase of population in Missouri and Alabama, an increase greater comparatively than that in Ohio. Defective land titles in Kentucky had caused many immigrants to pass through the State without locating. If a citizen of Kentucky lost his land, he could move into a Western State, where land was plentiful, and therefore cheap, and to be had with a good title. Congress had given a bounty for emigration from the older States to the new, by offering the public lands on highly favorable terms. Not only had the price been reduced from two dollars to a dollar and a quarter an acre, but, as an additional stimulus to immigration, the public lands, when entered, had been exempted from taxation for five years. Louisville had not increased as fast in population as Cincinnati; neither had Cincinnati increased as fast as St. Louis. Thus the slow increase of population was not confined to Kentucky. By the census of 1790 the eight free States had each a larger population than Kentucky.* In 1850, but three of these—New York, Pennsylvania, and Massachusetts—had a larger population.† True, when Ken-

* This includes the district of Maine, with a population of 96,540.

† In 1850 the population of Kentucky was 982,405; New York, 3,097,394; Pennsylvania, 2,311,786; Ohio, 1,980,329; Indiana, 988,416; Massachusetts, 994,514.

tucky had seventy thousand people, in 1790, Ohio was a wilderness, and in 1850 Ohio had the greater population. This change was evidently not due to slavery alone, because in 1790 Massachusetts had a population of three hundred and seventy thousand,* but in 1850 a smaller population than Kentucky.† It was not slavery, but the premium offered to immigrants to the West, and the difficulty in the land-titles of Kentucky, that had chiefly kept down its population. It was said that slavery retarded the internal improvements of the State. Kentucky had been less prodigal than Ohio, and consequently was behind her in internal improvements.

The debt in Kentucky was but one-fifth of the debt of Ohio. Had the State chosen to go into debt to an equal extent, it too could have had railroads and canals. Was it better to go into debt, as did Ohio, or to progress more slowly and upon a firmer foundation? In Ohio the average tax for the last five years had been fifty-five cents on the hundred dollars; in Kentucky it had reached only nineteen cents. It was said, again, that slavery prevented education, in evidence of which were cited the numerous free schools of the free States and the lack of them in Kentucky. Had Ohio been wholly dependent upon her own resources for her educational prosperity, she would have been behind Kentucky. She derived her

* 378,787.

† This statement is incorrect, as Massachusetts in 1850 had 12,109 more than Kentucky.

educational funds, not from her own, but from external sources. The federal government treated Ohio as a favored child; it treated Kentucky as a step-child. It had done nothing for Kentucky. A part of the prosperity of Ohio was due to the liberality of Virginia in surrendering her title to her Western land. In the aggregate, Ohio had the resources of the Virginia military school fund, of the United States military school fund, of the Western Reserve school fund, of every sixteenth section of public land, of the ministerial sections numbered twenty-nine, and of the Moravian school fund. In addition to these, the State had received numerous donations of land from the general government, and two millions of surplus revenue in the federal distribution of 1837. No such aid as any of these had been given to Kentucky. Although Ohio had twice the population of Kentucky, yet the value of taxable property in Kentucky increased eighteen millions in the year 1848, and at the same ratio the taxable property in Ohio should have increased thirty-six millions. On the contrary, it had increased but ten millions. Kentucky, with one-third of the population and one-third of the laborers of Indiana and Ohio, in that year increased her wealth nearly five and a half millions above both those States. It was said that slavery had been ruinous of the morals of the State. Was this proved when Ohio had thirty-seven per cent. more convicts in her penitentiary than had Kentucky, when Illinois had nine per cent. more, Michigan ninety-two per cent., New

York ninety-nine per cent.? when the only free State having a smaller percentage than Kentucky was Indiana, and that State had in proportion to its population only eleven per cent. less? The effect of slavery on pauperism might be seen in any of the counties of the State. Shelby County had two Representatives, though not quite entitled to two by its population. From its delegates to the convention it was learned that on the basis of pauperism in Shelby County there would be about four hundred paupers in the whole State. On the basis of pauperism in Jefferson, Bullitt, and Shelby counties, the whole number in the State would be about one thousand. Kentucky might be contrasted with Massachusetts, which had more than twenty-eight thousand paupers in 1848. For these the people of that State erected one hundred and seventy-four almshouses, for which they were taxed over a million of dollars, and in addition, for the support of these paupers, they paid three hundred and seventy-two thousand dollars, a sum nearly equal to the entire annual expense of the government of Kentucky. Might it not, then, be said that the absence of slavery was the cause of pauperism in Massachusetts?

The good effects expected from emancipation had not been realized. From 1790 to 1830 there were over one hundred and forty thousand emancipations in the Northern States,* the number declining after 1810. The cause of the decline was

* 141,699.

the "little benefit apparently which had resulted from the liberation of the slaves, and the consequent relaxation of effort by the friends of emancipation." Emancipation in the West Indies had resulted even more unfavorably. The friends of emancipation had long argued that free labor was cheaper than slave—that one freeman under the stimulus of wages would do twice the labor of the slave, compelled to industry by the whip—and, therefore, that slave labor was a great economic error.

Public sentiment in England had compelled the government to emancipate slaves in the West Indies. On the 1st of August, 1838, they were declared free. Emancipation soon brought on a crisis, the nature of which was disclosed by contrasting the exportation of sugar before and after emancipation. From 1831 to 1833, three years of slavery, the export of sugar from the West Indies was three million eight hundred thousand hundred-weight.* From 1835 to 1837, three years of apprenticeship, the exports amounted to less than three and a half millions;† from 1839 to 1841, three years of freedom, the exports fell to less than two and a half millions.‡ The English government soon found the commerce of Great Britain greatly lessened, and the home supply of tropical products falling below the actual wants of its people, and this diminution made it impossible to provide any surplus for the colonial market, or

* 3,841,153 cwt. † 3,477,592 cwt. ‡ 2,396,784 cwt.

to furnish products to other markets which she had formerly supplied. The result was an immediate extension of the market for slave-grown products and a new impulse to the slave-trade.* This experience established the fact that emancipation, either in England or in the Northern States, had not produced the good results expected from it. Could a different result be hoped for in Kentucky? The condition of emancipated slaves might be seen in the Island of Barbadoes, the most fruitful in the West Indies. There plenty of laborers could be employed at fifteen cents a day. They had been free twelve years, and knew that the only way to get a living was by work, yet evidences of decay and impending ruin were on every side. One-half of the estates in the island were in the hands of the provost-marshal, who, as sheriff, was selling them on judgments to pay creditors. Did Kentucky desire labor at fifteen cents a day and one-half of its plantations in the hands of the sheriff? Upon England the effect of emancipation had been well stated in the London *Times*: "The will of the people of England and the resources of the British nation had been applied with absolute authority to the extinction of slavery in the British dominions. The Northern States of America had no such power to alter the institution and the tenures of property in

* Compare this statement, which the member quoted from the *Westminster Review*, with the letter of John C. Calhoun, Secretary of State, to William R. King, Ambassador at Paris, August 12, 1844.

the slave-holding States. Congress itself had no such power; yet if it possessed this power, and had the will and the means to carry out a general measure of abolition, the experiment made by the British government, and the condition in which the British West Indies were placed by emancipation, were a most unanswerable argument against such a scheme."

If England was brought to the brink of ruin by emancipation, if this was the effect of it in other countries, could a different result be expected if it was resorted to in Kentucky? No man was willing to see emancipation without colonization, but colonization was impracticable. New York, Vermont, Massachusetts, and Rhode Island were cited as precedents for the treatment of persons of color, but none of these States, though they had emancipated their slaves, had colonized them. With all her power and wealth, New York could not colonize her twenty thousand negroes, nor Pennsylvania her less than fifteen thousand, when these commonwealths had abolished slavery. Could Kentucky colonize her two hundred and twenty thousand?* The free States, with a population of fourteen millions of whites,† and with only two hundred and eighty-five thousand negroes,‡ were unable to colonize this comparatively insignificant number. Again, it had been said that in manufactures the free surpassed the

* 220,992.

† The population of the free States in 1850 was 14,030,446.

‡ The negro population in these States at this time was 285,369.

slave States, and the inference was drawn that all articles used in Kentucky were produced in the Northern States. On the contrary, for a large portion of the raw material used in their manufactures, the Northern States depended on the slave States. Take away from the Northern States the cotton, the hemp, and the tobacco obtained from the South, and the value of their manufactures would be reduced at least three-fourths. It was said that the exports from the city of New York were greater than all those from the Southern States; but it should not be forgotten that nearly one-third of the exports from New York was sent thither from other States. One-third of the cotton raised in Louisiana and the corn and hemp of Kentucky was shipped to foreign ports from New York. Therefore, viewed from every point of view, slavery was a blessing rather than a curse. At least it was not the cause for any backwardness of Kentucky, whether in population, in education, in morality, or in wealth. By a vote of more than five to one it was decided to deny to the General Assembly the power to emancipate slaves without the consent of their owners, and immigrants should have the privilege of bringing their slaves with them; but the Assembly should be empowered to prevent the bringing of slaves into the State as merchandise.

The discussion of the status of the slave inevitably led to a debate on the position of the free negro. The Constitution of the United States was also the constitution of Kentucky, adopted as

the paramount law of the State when she entered the Union as a sovereign member. That Constitution was binding on the people of Kentucky. The only provision in it having the slightest bearing on the subject of free negroes declared that the citizens of each State should be entitled to all the privileges and immunities of the citizens of the several States. What was the true constitutional meaning of the word "citizen"? If the free negro was not a citizen, although he might be a subject, he was not included within the provision. The term "citizen" was derived from the Roman civil law. A Roman citizen entitled to the privileges of the state carried with him into all the provinces of the republic the right of protection by Roman law. In accordance with this principle, a citizen of the United States going into any State in the Union carried with him the same right of protection under the laws of that State as that to which its own citizens were entitled. In 1789 free negroes were not citizens of any State in the Union. A large portion of the population was then composed of African slaves and Indians, and the broad term, "We the people," must be understood to embrace whites alone, otherwise it would embrace all the slaves, the free negroes, and the Indians who were then within the limits of the country. It would make citizens of all the slaves of the Southern States, in whom the right of property was guaranteed by the federal Constitution, and slaves, as property, were made the basis of taxation and representation.

The Constitution of the United States was made by whites exclusively for the benefit of themselves and their posterity. Congress, in carrying into effect the provisions of the Constitution providing for a uniform rule of naturalization, applied the power to white persons only. Nearly all the States had given the same construction, for soon after the adoption of the federal Constitution they began to limit the immigration of free blacks, showing that they were not then considered citizens.

The Presidents of the United States had given the same construction by uniformly refusing to issue passports to free negroes. The term "person" as construed by the courts, was applicable to the white race only. Congress had power to make citizens of the United States and although a State might grant every State and political right to an African, it could not thereby make him a citizen of the United States so as to entitle him to the privileges guaranteed by that instrument to white citizens. Free negroes, thus having no right of citizenship, were left to the discretionary action of the States, and each State had power to impose any humane restriction upon him. He might be a subject; he could not be a citizen.* There were few emancipationists in Kentucky, although it was reported that there were many. To

* As authority for these ideas, reference was made to Tennessee *vs.* Claybourne, 1 Meigs, 332; 1 Little, 327; Judge Bullock's opinions; also 2 Kent, 70–71; Hobbs *vs.* Foggs, 6 Watts, 556.

emancipate the negro was to make him a freeman. No Kentucky emancipationist defended such a transformation. Nearly all of the emancipationists in Kentucky were slave-holders, yet few of them had freed their slaves. Emancipation was not prompted by love of the negro, but by a cold and heartless calculation of profit and loss. The wealthy champion of emancipation wished to convert his own slaves into cash. Emancipation, for the time at least, would reduce the value of land. The emancipationist would invest the price of his negroes in land, enlarge his domains, and surround himself with a dependent and cringing tenantry. Meantime the miserable slaves formerly belonging to him, over whom he had shed so many tears of sympathy, would be laboring in the cotton-fields and sugar plantations of the distant South. The whole plan of emancipation was cruel to the negro and unjust to his owner; cruel, because it tore the negro from those with whom he had been brought up, with whom he had many sympathies, and exiled him to be a slave among strangers; unjust to the owner, because it robbed him of property to which he was rightfully entitled. Colonization was visionary and impracticable. To colonize half a million negroes annually in Africa for fifty or a hundred years would exhaust the revenues of the Union. They would be sent, without reference to character or constitution, to encounter a wilderness and an unfriendly climate, by which they would inevitably be destroyed.

It was certain that the negro could never be

free in America. Far better was it for the negroes and the whites that slavery should remain. Fanatics might talk as much as they pleased about the natural rights of man; they could not make the negro free in the United States. They might read to him the Declaration of Independence until they were hoarse, still they could not change his Ethiopian skin. In no State was he really free.* In the North he scarcely enjoyed any other liberty than that of starving and dying. He was not admitted to the social circle; he could not eat at the same table or ride in the same carriage with the whites; he was assigned a separate seat in church, and worshipped at a different altar; when he died, his body was placed in a graveyard apart from that for the burial of white men. Far worse was the condition of the free negro in the North than that of the slave in the South. No State wanted free negroes, and nearly all States had stringent laws against their admission. Everywhere in America they were spurned and trodden underfoot; in Kentucky they were an unmitigated curse. Yet the question remained—What should be done with the free negro in Kentucky? Should he be banished by the constitution and the laws? Should he be made the chief attack of the criminal code, suffer transportation from the State, and, if he returned, be sold again into servitude? Should Kentucky, like Maryland, maintain a colony in Liberia, to which free negroes might be

* See Vol. i., Chap. xii.

transported? Should petty misdemeanors, when committed by free negroes, become felonies, and be punished for the sole purpose of ridding the State of this despised class? Should an emancipated negro in Kentucky, or a free negro or mulatto immigrating to it, who refused to leave the State, be deemed guilty of felony, and be punished by confinement in the penitentiary? In prosecuting slaves and free negroes for felony, should inquest by a grand jury be abolished? There was little variation in the answers to these questions, and the answers and the variations were equally unfavorable to the free negro. He was an anomaly in a slave-holding State; in the machinery of slavery he was a clog; socially, in so far as slavery was a social system, he was an agitator and an insurgent.

That the end of slavery in America was rapidly approaching was evident from the fierce efforts made by slave-holding States, in this year of grace 1850, to make the institution secure. Kentucky, Maryland, and Virginia seemed to be exhausting their resources in order to tighten the bonds of the slave, and the solemn formulation of these efforts in State constitutions was mild compared with their formulation in the laws. As the hour drew near when the shackles of the slave should fall from him, slavocracy was making spasmodic efforts, and, as it thought, reasonably, to make slavery perpetual. The virulence engendered by the opposition to slavery fell upon the free negro. This is evident from the treatment he received in

the conventions of Kentucky, Maryland, and Virginia in 1850. Yet by the constitutions and the laws of other equally sovereign States, the free negro was a citizen, and entitled by the national Constitution to the rights of citizenship in any State in the Union. The pro-slavery men in the Kentucky convention planned to make slavery secure by the new constitution. The provision securing it was not to be submitted separately for the approval of the electors. They must accept or reject the constitution as a whole. Rather than reject it, they would accept it with a radical pro-slavery clause making it impossible to abolish slavery in the commonwealth. It, therefore, became of the greatest importance that the manner of amending the constitution should operate solely for the perpetuation of slavery. It was not wise, however, to deny to a constitutional convention, or to the people, the right to permit emancipation. No attempt in this manner to fetter the action of the sovereign people should be permitted. The result might be obtained more easily by making it impossible to choose any other than a pro-slavery convention. To perpetuate the institution, the representatives of the people might be trusted better than the people themselves. This idea conformed in every detail with the Southern conception of a constitutional convention, that it possessed sovereign powers, and that the people should promptly accept and ratify its work.

The Northern idea of the functions of a consti-

tutional convention was wholly different: The convention is merely an agent of the people, elected to formulate a plan of government, which shall be submitted to the electors for ratification or rejection. The electors, not the convention, are sovereign.* It is only a committee of experts selected to arrange a plan of government, but wholly in-

* "The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an open court and to redress at our hands."—The Powers of a Constitutional Convention in the case of Wells and Others *vs.* the Election Commissioners, 75 Pennsylvania State Reports, 205 (1873). This doctrine prevails in all States in which a convention submits its work to the electors for ratific[illegible]ary opinion, that the convention has sovereign powers, is st[illegible] as follows: "We have spoken of the constitutional conventi[illegible] as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted."—Sproule *vs.* Fredericks, 69 Miss., 898 (1892). For an exhaustive discussion of the subject see Jameson's Treatise on Constitutional Conventions, their History, Powers, and Modes of Proceeding—Chap. vi., "Of the Powers of Conventions"; Chap. vii., "Of the Submission of Constitutions to the People." For a classification of American constitutions, those submitted and those not submitted to the people, see Appendix B of Jameson's work. From 1776 to 1850, the division is as follows: Constitutions not submitted to the

capable of promulgating it. By the Southern idea of a convention, slavery and the status of the free negro could be practically determined by the convention itself. A pro-slavery convention implied the perpetuity of the institution and hostility to free negroes. The chief privilege of the elector was to vote in approval of its work.

In this convention the spirit of Native-Americanism was strong. It was strengthened by slaveocracy. Kentucky did not welcome foreigners, and the members of the convention who advocated Native-Americanism easily quoted the favorite platitudes of the day in defence of their position. Although there were at this time less than two and a half millions of persons of foreign birth in America,* although the face of one born in foreign lands was seldom seen in [illegible] of the com-

people—South Carolina, 1776, 1778, 1790; Hampshire, 1776; Virginia, 1776; New Jersey, 1776; New York, 1777; Pennsylvania, 1776; Maryland, 1776; Delaware, 1776, 1792, 1831; Georgia, 1776, 1795, 1798; North Carolina, 1776; Vermont, 1777; Kentucky, 1792, 1799; Tennessee, 1796; Ohio, 1802; Louisiana, 1812; Indiana, 1816; Illinois, 1818; Alabama, 1819; Missouri, 1820; Arkansas, 1836; Florida, 1845—(Twenty-eight). Constitutions submitted to the people—New Hampshire, 1778, 1781, 1791, 1850; Virginia, 1829, 1850; New Jersey, 1844; New York, 1821, 1846; Pennsylvania, 1838; Maryland, 1850–51; North Carolina, 1835; Georgia, 1839; Massachusetts, 1778, 1780, 1820; Connecticut, 1818; Rhode Island, 1824, 1842; Tennessee, 1834; Ohio, 1850; Louisiana, 1845; Indiana, 1850–51; Mississippi, 1817, 1832; Illinois, 1847; Maine, 1820; Missouri, 1846; Iowa, 1844, 1846; Michigan, 1835, 1850; Texas, 1845; Wisconsin, 1846, 1847; California, 1849—(Thirty-six). It is to be noticed that after 1800 constitutions have usually been submitted.

* 2,244,602.

munities of the South,* yet slaveocracy loudly cried out that American institutions were in danger, and that the powers of Europe were in league to destroy democracy in America. Not free government alone, but Protestantism, was in danger. Against these dangers the cheapest and most efficient defence was slavery. Therefore, the institution should be protected not only in the South, but it should be extended over the entire country. As a cheap defence of the United States, it merited the support of the people in every commonwealth. Nations, like men, had fits of insanity. Abolitionism was a passing popular madness. As soon as the true character of slavery was understood, the institution would be rapidly extended over the land. The Southern slave-owner, therefore, looked with contempt upon the Northern free-soiler as a man blind to his own interests. Native-Americanism, however, was not suffered to dominate the convention. The members who advocated it spoke boldly and at length, but their more conservative associates succeeded in keeping it nominally out of the constitution. It was, however, substantially incorporated in the provisions favoring the perpetuity of slavery. In so far as Native-Americanism favored slavery it dominated this convention. The principal reason for eliminating it from the constitution, except in its pro-slavery provisions, was because, in the opin-

* Persons of foreign birth residing in the slave States in 1850 numbered 241,665.

ion of many members, its doctrines violated the rights of freedom of worship and of conscience. The constitution ought not to discriminate between opposing sects. It should guarantee to all men the equal protection of their religious and civil rights. By accepting the one and rejecting the other, the convention, therefore, carefully discriminated between the political and the religious elements of Native-Americanism.

At this time, in many parts of America outbreaks between Protestants and Catholics were not infrequent. For these the Native-American party was usually blamed. Several outbreaks of this kind were cited at length in the convention,* but only with the effect of causing it to avail itself of all the Native-American elements favorable to slavery.

On the 20th the work of the convention was brought to a close by the report of the committee appointed to prepare an address to the people of the State. It not only shows the course of political thought at that time in Kentucky, but also that which then generally prevailed throughout the Union—that the people could more safely and wisely exercise the powers of government than could their delegates. The controlling principle of the convention had been the restoration of power to the source whence it emanated — the people. They were anxious for reform, and, obe-

* Especially the riot in Sandusky, Ohio, December 12, 1849, referred to in the convention five days later.

dient to their wishes, the constitution of 1799 had been changed by providing for biennial sessions of the Legislature, limited in their duration to sixty days. Public credit was protected by expressly prohibiting the Legislature from contracting any debt, save for the expenses of the government, without the consent of the people, given at the polls. The executive was shorn of much of his power and patronage, the power of selecting agents necessary for the proper administration of the government in its several departments being vested directly in the people. It was still the duty of the Governor to enforce the execution of the laws. For the first time in the history of the commonwealth, its judges were made elective. A court of appeals was created consisting of four judges. The State was to be divided into four districts, in each of which an appellate judge was to be elected for the period of eight years. The Legislature had power to reduce the number of judges to three. The number of judges of the circuit court was reduced from nineteen to twelve, to be elected for six years in their respective circuits. The old county-court system was abolished. In each county the people were to elect one presiding judge and two associate judges, having the jurisdiction exercised by county courts under the constitution of 1799, except when the county levy was to be imposed or a county debt was to be created, when the General Assembly might require the justices of the peace, also elected by the people, to form a part of the court that levied the

county taxes. The clerks of the several courts, the sheriffs, the justices of the peace, the constables, all other county officers, and all officers of the militia, were to be henceforth elected by the people at stated periods. Public credit was still further sustained by declaring the resources of the sinking-fund inviolable, and by requiring its faithful application to the payment of the interest and principal of the public debt. The school fund was dedicated to the support of a system of public instruction in primary schools, in which each county was to participate, and was secured by the constitution in its due proportion of the fund, thus bringing the means of an elementary education within reach of all the white children of the commonwealth. The old relation between master and slave was to remain. Public sentiment, far from demanding any change, expressly rebuked any constitutional action on the subject; therefore it was left untouched, and this "great element of wealth and of social and political power," it was supposed, would remain "undisturbed and secure" so long as this constitution continued the paramount law of the State. All agreed that the free negro population in the commonwealth was worthless, and greatly detrimental to the value of slaves as well as to the security of slave-owners; therefore the new constitution provided that no slave should be emancipated except upon condition that he be sent out of the State. The constitution could emanate only from the convention as the organ of the people, carrying their will into effect; for

this reason the work of the convention was submitted to the popular vote. On the 6th and 7th of May the people voted, and adopted it by a majority of more than fifty thousand votes.*

On the 3d of June the Secretary of State laid the official returns before the reassembled convention. Though approved by five-sevenths of the voters, the constitution was not ratified without many expressions of disapproval, and the convention proceeded to revise the instrument, so that it would more perfectly satisfy public demands. The revision consisted chiefly in changing the time for the election of State officers. There was no effort to modify its organic provisions. On the 10th the revised constitution was formally adopted by the convention, and on the 11th, in the fifty-ninth year of the commonwealth, became its supreme law.

* For the constitution, 71,653; against it, 20,302.

CHAPTER VII

DEMOCRACY IN A NORTHERN STATE: 1850—MICHIGAN

EIGHT days before the adjournment of the Kentucky convention, delegates were assembling in the hall of the House of Representatives at Lansing, to make a new constitution for the State of Michigan.* Thirteen years had passed since the adoption of its first one, and many reforms were now demanded. Most of them grew out of the experience of the Northwest under its laws favoring land speculation, internal improvements, fiat money, and irresponsible banking. There was a demand for the extension of the suffrage; for a system of local government; for legislative reform, in the nature of limiting the power of the General Assembly to pass special laws, and also that there should be an extension of the rights of married women. As in other parts of the West, there was a demand for some provision for an exemption of the homestead from claims of creditors.

* The principal authorities for this chapter are the Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan, 1850; 937 pp., 8vo; Lansing, 1850: and the Journal of the Constitutional Convention of the State of Michigan, 581 pp. and Appendix, 8 Documents, etc.; Lansing, 1850.

The character of the constitution that the convention would submit could be learned from the composition of its membership. Forty-three of the delegates were natives of New York, thirty-eight of New England; seven were from New Jersey, Pennsylvania, and Ohio; five from the British Provinces. Only one member was a native of Michigan, and only two were born in slave-holding States. In their occupations they represented Northern rather than Southern interests. Forty-eight were farmers; twenty-two, lawyers; eleven, merchants; six, physicians; five, millers; three, printers; two, mechanics; one was a teacher; one, a county judge, and one a clergyman.

Michigan, like Maryland, consists of two peninsulas, the interests of whose population are closely connected with those of a contiguous territory under a different civil jurisdiction. As yet the northern peninsula was scarcely known to settlers, and its mineral wealth was quite unknown. The southern peninsula was a wilderness north of Grand Rapids, and more than two-thirds of the area of the State did not have, on the average, a population of two to the square mile. Immigrants were pouring into the State, and the convention felt convinced that in a few years the State would be one of the most populous in the Union.

The bill of rights reported on the 8th indicated constitutional principles characteristic of a free State, and some new and permanent features worked out by public experience in the North since 1800. The classic provisions of the old

Virginia bill of 1776 were repeated, and new ones were added, equally suggestive of the evolution of American democracy. The great provision of the Ordinance of 1787 was embodied in the clause forbidding slavery. The long agitation against imprisonment for debt had been won by reason and humanity, and it was now forbidden except in cases of fraud, or for a militia fine in time of peace. An important reform that had been winning its way for a quarter of a century was embodied in the provision that all laws should be of a general character and have a uniform operation—one of the earliest modifications providing against special legislation. A remnant of an eighteenth-century controversy was suggested in the provision that no one should be made incompetent to be a witness on account of his opinion on matters of religious belief. A social abuse against which reform had long been directed occasioned the clause forbidding divorces, except by due judicial proceedings; and also another forbidding lotteries or the sale of lottery tickets within the State. The correction of another evil was attempted in the clause requiring the assent of two-thirds of the members of each branch of the Legislature to every bill appropriating public money or property for local or private uses. It was also sought to protect the rights and functions of a State by the insertion in the constitution of a provision forbidding the Legislature to lease or grant, for a longer period than twelve years, the agricultural lands in which rent or service of any kind was reserved.

No corporation should be permitted to hold any real estate for a longer period than ten years, except it were actually occupied in the exercise of the franchise.*

When a State constitution is in process of formation, the provisions which are suggested, even though they may not be finally incorporated in the instrument, are indicative of the character of the evolutionary process going on. Thus it was now suggested that the Speaker of the House of Representatives should be elected by the people; that the sessions of the Legislature be biennial; that after the first sixty days of any session members should not receive compensation; that the vote of the members of both Houses were necessary to alter or amend any law, except at sessions when an entire revision of the laws was ordered in pursuance of the constitutional provision—an indication of a growing popular distrust of Legislatures and of traditional processes in legislation. Another suggestion characteristic of the times forbade the appropriation of public money for the support of religious seminaries, or for the benefit of religious societies, or for the payment of any religious services—the latter provision being particularly intended to abolish the chaplaincy in the Legislature.† The suggestion at once precipitated

* See Vol. i., Chap. ii., for an account of the bills of rights in the American State constitutions from 1776 to 1800, and Chap. xiii., in this volume for a similar account of the constitutions from 1800 to 1850.

† The constitution of Washington of 1889 provides, in the eleventh section of its declaration of rights, that "No public

a debate on religious services in the Legislature, which again revealed the familiar ideas of the eighteenth century, that reverence for the law of God requires men to acknowledge Him in all their ways; that a commonwealth which does not have a chaplain in both branches of its Legislature may not expect to be the recipient of divine favor; and that grave dangers will be run unless the State follows long-established precedent and shows sufficient reverence.* In defence of the chaplaincy was cited that portion of Washington's farewell address beginning "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."

Another suggestion was to empower the Legislature to provide that a less number than twelve might constitute a jury,† a change which has been embodied in nearly all the later constitutions of Western States. With the consent of the parties interested, trial by jury might be waived.‡ Might it not also be well to abolish grand juries, on account of the great expense they entailed upon the State? An evil almost paramount in the com-

money or property shall be provided for, or applied to, any religious worship, exercise, or instruction, or the support of any religious establishment."

* See the account of the religious qualification for voting and for office-holding in Vol. i., pp. 53, 54, 60, 68–71, 77, 78, 82, 83, 95, and Chap. vii.

† Taken from the constitution of Iowa of 1846, Art. i., Sec. 9. See note on juries in county and in justices' courts, in Michigan, by statute, *infra*.

‡ Taken from the constitution of New York, Art. i., Sec. 2. The provision existed by law in Michigan.

monwealth was aimed at the proposition that every act of the Legislature should embrace but one subject, clearly expressed by its title.

The convention had been but three days in session when petitions began to appear praying that the right to vote be no longer limited—as in the old constitution—to white persons. The judicial system of the State should be reorganized so as to provide judicial circuits and that there should be an election of a judge in each circuit. Would it not also be well if judges of the supreme court reported to the Legislature, at the commencement of each session, what defects they observed in existing laws, and make suggestions for amendment? Resolutions were introduced to provide for an annual registration of voters; to provide for the establishment of a system of public schools supported by taxation, free to every child in the State; to allow those aliens who had declared their intention to become citizens of the United States, and who resided in the State one year preceding the election, to vote—but ought not this right to be limited to white persons?—to submit all acts passed by the Legislature to justices of the supreme court, in order that they might pass upon their constitutionality; to appoint commissioners to codify the laws of the State; to provide for single Representative and Senatorial districts; to make all venders of intoxicating liquors responsible for the consequences resulting from the pursuit of their traffic; to abolish capital punishment; to require that all banking institutions be established by

general laws, and be based on State stock securities, and that before these laws should take effect they be submitted to the vote of the people; to reduce the number of county supervisors, and elect them by districts or on a general county ticket; to secure to married women the rights to all property owned by them at the time of their marriage, or that they at any time afterwards acquired by inheritance, and also to empower them to dispose by will of their property without the consent of their husbands; to reduce the daily allowance of Representatives to two dollars; to organize police courts with limited jurisdiction in cities and villages; to abolish the State Senate, and make the Lieutenant-Governor the President of the House; to make the Governor of the State ineligible to the office of United States Senator, or to any other office, during his term; to extend the right of suffrage "to all white and single females twenty-one years of age"; to establish an agricultural school and model farm; to disfranchise duellists and persons guilty of betting on elections; to create a board of State auditors; to establish a house of refuge and correction for the punishment of juvenile and female offenders; to abolish all laws for the compulsory collection of debts; and to prohibit the Legislature from passing resolutions instructing Senators in Congress, unless by a two-thirds vote in each House.

The debate on the bill of rights illustrated the influence of constitutions and laws of the Eastern States upon those directly to the west. One

clause provided that no person's property should be taken for public use without just compensation. It was now proposed to amend it by adding that such property should not be appropriated for the use of any corporation without previous compensation. As the State is a corporation, the question immediately arose whether it should be required to pay for land in private ownership but used for roads. The amendment was explained as referring to private corporations only, not to the State. Throughout the discussion that followed, the constitution, laws, and judicial decisions of New York were cited as sufficient precedent.* In Michigan, as in New York, the law gave authority to lay out roads through private lands, leaving their owners to make application for damages.† But, it was asked, might not a railroad or a canal company seize on private property under the law in order to secure right of way, and, therefore, ought not some restriction be put on the exercise of the right of eminent domain? This was a question beginning to be heard all over the North, and intimated the great struggle pending between corporations and individuals, which was to be fought out, and in part recorded, in the laws and constitutions of the next half-century. It was at last decided to express only in

* The condition of New York in 1846 is shown in the Report of the Debates and Proceedings of the Convention of that year (the *Albany Argus* or the Atlas edition), and in the journal of the convention, 1648 pp., 8vo; Albany, 1846.

† Compare constitution of New York of 1846, Art. i., Sec. 7.

general language the principle which protects private ownership of property and secures it against seizure without compensation. Objection was made to the use of the word "slavery" in the constitution, and the phrase "involuntary servitude" was proposed as a substitute. True, slavery was used in the clause in the old constitution, and the entire clause was taken from the Ordinance of 1787, but it was a word highly objectionable to the people of Michigan. If the new constitution should be in force a long time, might it not, from the use of the word, be considered that slavery had once existed in the State? But the convention refused to abandon the language of the Ordinance.

Considerable opposition was manifested to admitting the clause that no person should be rendered incompetent as a witness on account of his religious belief. Was not the principle sufficiently protected in the clause granting freedom in religion? To this it was replied that a greater security was required, for that clause was intended to protect civil and political rights, and the protection of a witness was not the exercise of a civil or political right. Too often witnesses had been ruled off the stand on account of their religious belief, and thus the court assumed inquisitorial power over citizens. "It is not right," said a member, "that a man should be expelled from the stand, and not be allowed to give testimony because he does not concede to the creed that has been hewed out by other persons." Make a witness responsible under the laws for his testimony and punish him if he commits perjury.

The article on leasing agricultural lands for a period not longer than twelve years was copied from the New York constitution of 1846.* This, a member thought, was not a sufficient reason for incorporating it in the constitution of Michigan. But, it was replied, the disposition of property in the State of New York had been productive of serious evils, and the provision had been reported to prevent them in Michigan. The experience of New York ought to be a sufficient precedent. The clause had originally been inserted in the New York constitution in order to meet evils arising from old rights existing after the Revolutionary war.† These evils, it was now said, could not possibly arise in Michigan; and the motion to reject prevailed.

The clause limiting corporations from holding real estate for a longer period than ten years, unless it were actually held by the corporation in the exercise of its franchise, being under consideration, it was asked what was to be done with the property after the expiration of the time. Let it be sold, was the reply; no corporation should hold real estate beyond its wants. But would not this be a violation of a contract, and conflict with the Constitution of the United States? Surely it would operate injuriously in Michigan. Religious societies were corporations holding real estate, and

* Art. i., Sec. 14.

† The reference is to the causes of the rent riots in New York—the system of permanent tenancy and rent service, established in certain parts of New York before the Revolution, in the manorial grants. See E. P. Cheney's *Anti-Rent Agitation*.

such a provision respecting them would be manifestly unjust and unwise. It would impair vested rights and have a retrospective action. To this it was answered that if a religious society owned more real estate than was necessary for its use, it would not be obliged to forfeit it, but only to change it into some other fund "less objectionable to the interests of the community." Might not the difficulty be met by limiting the operation of the clause to the future? But even in this case questions difficult to settle would arise as to what was to be understood by the words "actually occupied." How much could a corporation occupy? "A banking-house and lot," was the reply. The evident object of the clause was to prevent corporations from acquiring large tracts of land and holding them in perpetuity. The disposition of the members was to retain the clause.

On the 14th began the discussion of proposed changes in the jury system. There was no desire to abolish the right of trial by jury; but to empower parties to waive a jury trial in civil cases, and to empower the Legislature to provide that in those cases a less number than twelve might constitute a jury, expressed public sentiment on the subject throughout the North. It was proposed to change the phraseology of the clause so that in all civil cases trial by jury should be deemed to be waived unless demanded by one of the parties to the suit. In defence of this change it was said that for many years twelve had been considered the proper number for a jury, yet

in this number there was no magic, and no good reason could be assigned why twelve men were better qualified than six. Under the constitution of 1835 there was doubt whether the act of the Legislature authorizing a jury of less number than twelve in the county courts was valid.* It was therefore necessary to define the right clearly. The law had given satisfaction, though its constitutionality had been doubted. Juries of less than twelve had often been called in the county courts, and, so far as was known, the rights of parties had not suffered. A smaller jury would diminish the expenses of the counties, and also of individuals who had causes on trial. The answer was thought to be sufficient that by common law a jury consisted of twelve men; and if the constitution declared the right of trial by jury inviolable, and then authorized the Legislature to reduce the number, one part of the constitution would conflict with another. Why limit the authority to provide a jury of less than twelve in civil causes only? But the convention was not prepared to make so radical a change.

Even more sweeping was the proposition to abolish the grand jury. Ought it not at least to be left discretionary with the Legislature to continue it? The change would strike down an institution, venerable for its antiquity, with which the people were

* A jury of not less than six was allowed in justices' courts (Revised Statutes, 1846, Chap. 93, Sec. 80), and in county courts (*Id.*, Chap. 92, Sec. 24). It was doubted whether Art. vi., of the Constitution of 1835 permitted the innovation.

familiar. If the grand-jury system was inexpedient, or had failed to accomplish the object for which it was intended, would it not be better to find a substitute? The grand jury was a conservative institution, and provided for in the constitutions of all the States. There it was placed beyond the power of the Legislature. It had been said that the necessity which gave rise to the grand jury had ceased to exist; that as monarchical institutions do not exist in America there was no need to continue the grand-jury system here. If it was abolished, would prosecutions through the agency of justices of the peace give no ground of complaint? Would individuals run no risk of being arraigned on insufficient charges? Would not the abuses which it was said were incident to the system be increased tenfold? Why might not frivolous and malicious complaints be made before justices as well as before grand juries? The abolition of the system would not change human nature. The action of the grand jury was not final. Its province was merely that of inquiry, whether there be sufficient evidence of crime to demand that the person charged be put on trial, and in such case to present the accusation by indictment. The grand jurymen were selected from the electors of the county. They received the charge of a judge familiar with the subject—as to the duties they were required to perform, as to the criminal laws, as to the evidence, and as to any special matters within the county requiring their investigation. "And it is a rule which is given

in charge to them, that, to find a bill in a particular case, the evidence must be such as would be sufficient on its face, if uncontradicted and unimpeached, to convict before a traverse jury." Furthermore, if any member of the grand jury was in doubt as to the law or proper evidence relating to any matter brought before it, he could obtain the necessary information from the court. The grand jury having assembled, it was authorized by law to inquire into matters relating to the civil police of the county, to the manner in which public officers had discharged their duties, to the administration of school laws, and to the care and condition of highways—indeed, to everything connected with the good order of society. These powers and duties were independent of presentments in particular cases. What citizen would be willing to leave to prosecuting attorneys or to a judge the sole decision whether proceedings should be instituted against the citizen? Would not this be too much like the process of the odious Star Chamber? For the inquiry by a grand jury it was now proposed to substitute an examination before justices. What citizen would be willing to leave the examination solely to them? In each county there were some seventy justices, before each of whom such complaints might be entered. Would they be less likely than a grand jury to be subject to personal malice, to harassing complaints, and to jeopardize individual character and right? The grand jury was objectionable as a secret body, but this character tended to in-

crease its value; they were better able to investigate. The convention had not assembled to make changes which public opinion did not require, nor to change fundamental laws which had not been questioned. At least, it should make no changes unless clearly necessary to meet the wants of the people and to keep pace with the progress of the times. There was not sufficient evidence that public opinion throughout the State required this change. The expense incident to prosecutions through justices, attorneys, and judges would be a sufficient reply to the complaint that the grand-jury system was too expensive? Possibly the mode of selecting grand juries was not as perfect as it might be made. To abolish the system would be to break with the past, with no equivalent offered. To this defence of the system it was replied that its antiquity was no reason for its retention. If antiquity alone made institutions venerable and useful, then there was no object in the American Revolution. In practice, as everybody knew, in a great majority of cases a warrant against an accused person was issued by a justice. Seldom was the grand jury applied to as the first instrument to punish a criminal.

At this point, a defender of the system inquired how those who advocated its abolition could defend their demand on constitutional grounds. Did not the fifth amendment of the national Constitution provide for a grand jury? To this it was replied that the amendment was intended solely as

a limitation on the exercise of power by the government of the United States; that the Constitution was ordained and established by the people of the United States for themselves, and not for the government of individual States; and that each State established a constitution for itself, providing such limitations and restrictions on the powers of its particular government as its judgment dictated. The powers which the people of the United States had conferred on the general government were to be exercised by itself, and the limitations on its power were only applicable to that government.* Before the debate closed it appeared that the principal objections to the grand jury were its expense and its secret and inquisitorial character. To the first objection answer was made that the expense of the system for the year 1849 was about a cent a year to each inhabitant of the State.† The second objection was answered by a member who resided near the Indiana border. "In times past," said he, "there have been confederated gangs of counterfeiters and horse-thieves along the border of our State, from Lake Erie to Lake Michigan, flitting from one State to the other — concocting plans in one State to be put into execution in another. Now, I ask, what could be done towards the pun-

* The reference was to Chief Justice Marshall's decision in Barron *vs.* the Mayor and City Council of Baltimore, 7 Peters, 243. For a comparison, see Withers *vs.* Buckley, 20 Howard, 84.

† $3871. The population of Michigan was estimated at this time to be 387,100; see Debates, p. 86; the census of 1850 reports, 397,654.

ishment of such gangs by commencing proceedings in open court? We all know by observation the sympathetic cords that draw rogues together, and how instinctively they fly to the rescue of one another. 'Birds of a feather flock together.' All that portion of the neighborhood who sympathize with the criminal throw their weight into the scale to shield him and defeat the ends of justice." And he referred the convention to a formidable band which a few years before had been ferreted out and broken up in the counties of Hillsdale and St. Joseph, though the undertaking had required "all the energy and vigilance of the officers, all the secrecy and ingenuity of the grand jury, to unravel knot after knot of the evidence, and bring them to justice." Without the grand jury, he declared that they could not have been brought to punishment. A justice's court, or an open examination, "would have been as spider's meshes around them. So bold and desperate had they become, they shot at the sheriff's posse in open daylight." What would be the result if elective officers should be substituted for a grand jury? "If society relies upon a prosecuting attorney, and he is made elective, as he is sure to be under the constitution we are now framing, he may owe his election to the votes of a dozen men whom it is his duty to bring to justice. The rogues in the community invariably throw their votes for the most timid, or the most corrupt, or the weakest man. Whichever party nominates the most incompetent man will be surest of success.

So of justices. In such hands society cannot be safe." Common-sense dictates secrecy in the administration of government. This is absolutely indispensable to the prosecution of military and naval operations, in the executive department, and in the judiciary. Far from being censurable, the employment of secrecy is laudable in the ferreting out of crime, and in rejecting it society would pursue a suicidal policy.

Hitherto, in Michigan, as in other States and Territories of the Northwest, the right to vote had been limited to free white persons. But public opinion was changing, as shown by the increasing number of petitions now presented, that the right of suffrage be extended to persons of color, and even to Indians who had given up their tribal relations.* Public sentiment was by no means unanimous for the extension of the suffrage to persons of color, but it was willing to extend to them all civil rights—as shown by the vote on the 15th, granting the use of the hall to a negro who had been appointed by a convention called in the interests of the colored race, and recently held in Detroit, to present to the convention the subject of the extension of the franchise to negroes.

The question of abolishing the grand jury was not yet settled, and a member now offered, as an

* On the 15th a petition was presented praying that ordained ministers of the gospel be prohibited from holding offices of honor or trust under the constitution, a petition whose subject-matter had been thoroughly, and for the first time, examined in the Kentucky convention. See Chap. iii.

amendment to the clause under discussion, a provision from the constitution of his native State—that no person should be holden to answer for any crime the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury, except in the land or naval forces, or in the militia when in actual service in time of war or public danger; and that grand juries should have cognizance of no other offences.* His amendment was a compromise between the abolition and the retention of the grand-jury system, and was defended as doing away with the grand jury, except in cases of death or imprisonment, and thus meeting the principal objections which had been advanced. The exception relative to the land and naval forces should be struck out, said a member, because it might be construed as having reference to a possible dissolution of the Union, an idea which many had intimated they did not wish the new constitution to convey; and the amendment was carried. It was finally decided to allow a jury of less than twelve men in all courts not of record.

The committee on the executive department reported on the 17th. The Governor and Lieutenant-Governor should be elected for two years. The age of thirty years, citizenship of the United States for five years, and residence in the State for the two years next preceding the election were to be required of these officers. In case two persons

* Constitution of Connecticut, 1818, Art. i., Sec. 9.

had an equal vote for either office, the Legislature should choose one of them by joint ballot. Members of Congress, and persons holding office in the United States or in the State, were to be ineligible to the office of Governor. The ideal separation of powers, classically expressed in the constitution of Massachusetts of 1780,* was agreed to without discussion. At the time of the American Revolution this division was one of the great issues of the day; at the time of the Michigan convention it had become so familiar an element in the concept of democracy in America as not even to require statement in a constitution.

There is little order in the discussions in a constitutional convention. Debates usually follow a committee report, but a resolution may come up almost at any time after it has been presented. On the 17th began the discussion of apportionment and legislative districts. It is a question which has vexed every convention in our history. It is practically impossible to apportion representation with mathematical accuracy. An equitable apportionment is at best only approximate. In many State constitutions, especially the earlier ones, the membership of each House was fixed by the constitution, but after some years' experience, it having been found that this violated the equities of proportional representation, it became usual to fix a minimum and a maximum membership, leaving the apportionment to be made by the Legis-

* Part 1, Art. xxx.

lature at regular intervals. Annual elections were giving place to biennial for the House and to quadrennial for the Senate.* On no subject have conventions varied more widely than in their interpretation of a legislative district. What shall be the unit of measure—a county, a township, a city, a ratio of the population, or an absolute number of persons? Some members had been chosen to this convention instructed to vote for single Senatorial districts. The committee on the legislative had reported in favor of single districts for the House, but recommended a Senate of thirty-two members—two for each district. The number of Senators was at once objected to as too large. Twenty-four would be better, and these might be increased from time to time with the increase of population. The term of four years for Senators was recommended, so that half the districts might hold their elections at the same time, thus securing a permanent body, possessing also legislative experience. Large electoral districts were objectionable because of the irresponsibility of the Senators to their constituents.† By adopting the principle of single districts, every Senator would become familiar with the wants of his constituents, and they would know him thoroughly. If

* Except in Massachusetts, Connecticut, and Rhode Island.

† Throughout the account of this convention it will be well to compare the results of the debates, as shown in the adoption of various provisions, with the constitution of Michigan of 1835, and indeed with other State constitutions up to 1850; and for this purpose see Chaps. xiii., xiv., xv., which treat of the State constitutions from 1800 to 1850.

these views were to prevail, it was at once objected, there would be slight need of a Senate, and it might as well be merged in the House, as indeed one of the delegates had proposed. The method had been "tried in Vermont and Pennsylvania, and proved so unsatisfactory as to be speedily abandoned."* The design of a Senate is to operate as a check upon the House, and thus give a conservative character to the Legislature. Its members should represent a large territory and different constituents and interests from those of the House. By adopting the single-district system for the House, the representative districts would be less extensive than before, but the interests and feelings of the people could differ but little, as their business transactions brought them into ever closer relations. Though elected by a portion of the county, the Representative would practically be a representative of the entire county as much as was the Senator. If the single-district system prevailed for the Senate, and any excitement existed in the district, its Senator would be as much affected as its Representative. Should the Senator and Representative be chosen for the same time and for the same term, two other distinctions between the Houses would be destroyed. The only material difference, then, existing between them would be in their respective forms and proceedings. On the other hand, when the Representa-

* See the chapter on the legislative in State constitutions from 1776 to 1800, Vol. i., Chap. iii.

tives and Senators stood for different territories, different constituencies, and different interests, measures proposed by one House would be severely scrutinized by the other, and thus hasty and immature legislation would be prevented. Constituted as it usually is, the Senate is not so apt to yield to sudden impulse as the House; its knowledge of business and the principles of legislation fits it admirably to prevent those evils that often result from the lack of these qualities in the House. At this point Madison, in *The Federalist*, was quoted as sufficient authority: "A Senate, as a second branch of the legislative Assembly, distinct from and dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. * * * As the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government." *

If the single Senatorial district system should be adopted, an almost insurmountable obstacle would arise — to preserve the counties entire, to prevent divisions, and at the same time to give a

* *The Federalist,* No. lxii.

full and fair representation. Not alone is it a bad policy, but few people will submit to a division of their county by which one part is attached to another for the purpose of forming a Senatorial district. There remains, too, the difficulty of dealing with a fraction or detached portion of the population. The people being thus unwilling to sunder the business ties and political associations with which they have long been identified, the introduction of the single-district system only breeds confusion. It was proposed to reduce the term from four years to two, a reduction likely to be made if the single-district system was adopted. As much experience as possible should be provided in the Houses. If the causes of much of the legislation of which complaint has been made are examined, they will be found to be the result of inexperience. Experience in legislation can be obtained only by long terms or re-elections. The former a convention may give; the latter, the people. But rotation in office has become so customary it is exceedingly difficult to elect a member twice in succession, and would be far more so if the term was made four years. The election of Senators therefore for so long a term, and their division into two classes, by choosing one-half every two years, would give the State a body of experienced men on whom to rely. Single representative districts for the Lower House bring that body as near the people as possible. The Senate, however, ought to be differently constituted. What system, it was asked, is superior

to that under the constitution of the Union? Of course, in apportioning a State, the federal principle as to territory and population cannot be strictly followed. The Senate of a State, however, should possess characteristics similar to the Senate of the United States—experience, practice in all the arts and forms of legislation, and knowledge of the country.

At this point it was remarked that as the clause provided for two members of the House in a district, and also that no county should be divided in the formation of a Senatorial district, the effect would be the disfranchisement of some counties —such as Wayne, which, in a Senate of thirty-two members, would be entitled to three Senators. What was to be done with the excess? Three members could not be given, and yet a large portion of the people would otherwise be unrepresented. But this difficulty was not serious. Would not the Legislature at its first session reapportion the State and make the division as nearly as practicable according to population? If the fraction remaining was more than one-half the ratio established, the district would be entitled to a Senator; if less than one-half, it would not.

It was suggested that some objections which had been mentioned would be removed if Senators should be elected by double districts—that is, one from each half of the district alternately. If the Senate was elected by single districts, this would not secure representation to the respective parts of the district, but would give great induce-

ments for the exercise of bad faith by one part of the district towards the other, and thus encourage political corruption. Those who asserted that treachery by one part of the district towards the other was not to be expected, and need not be provided against by the constitution, showed little practical knowledge, it was said, of the workings of political machinery. What election in a district that furnished two or more members had not witnessed more or less bad faith—"bargain and sale," as it was called—mortifying to an upright citizen, because he was conscious that though treachery had been committed, it was frequently rewarded? The only way in which such treachery could be punished was that one part of the district should excel the other in treachery; an evil which the system of electing two or more members from one district, without assigning to each portion of the district its member, would encourage.

Over-legislation had already become an evil in the United States. The commonwealths were abandoning annual sessions of the Legislature for biennial, and it was now intimated that the people of Michigan were in favor of triennial sessions, in order further to remedy the evil. If the sessions were too infrequent, however, the result would be that delegated power would in a great measure cease to be under the control of the people, and cease to be returned to their hands at short and stated intervals. One of the principal objects in calling the convention was to lessen the ex-

penses of legislation and give more stability to the laws. Abuses in the United States government, a member said, had grown entirely out of the executive department. It was the President who had violated the rights of the people. The history of the federal government was in this respect like that of Michigan. There the abuses practised on the State had grown out of the executive department, while no one could put his finger upon the first abuse perpetrated by the Legislature. What would be gained, therefore, by changing from annual to biennial sessions? It would limit the action and lessen the efficiency of a department the least likely to abuse its power, and close from the public eye and seal from all means of investigation for two years the transactions of a department most likely to abuse its power, where frauds might be the most easily practised, and which most required the vigilance of the public eye upon it. Biennial sessions would only mean greater abuses in the executive and a less opportunity for correcting them by the Legislature. Michigan, it was said, came into existence "on a paper bubble, the wandering meteor of the times."* In the first stages of its political existence it had come under the influences of the greatest speculative mania that ever affected a people. They had gone through the ordeal of an expanded currency—fiat money—that had perished on their hands, and they had suffered from

* In allusion to the land speculations preceding the panic of 1837; the State was admitted January 26th of that year.

the collapse. From the disorganizing influences sure to follow such folly, the State had suffered, and by immature and fluctuating legislation. The sessions of the Legislature had been long and expensive, and the State had been growing rapidly. When the convention of 1835 met, Michigan was little known. There were now more than twenty delegates in the convention from territory which was then totally unknown; and yet Michigan was still on the frontier of civilization. In its first organization of government the wants of a new administration had to be met. Every request, whether local or general in character, was therefore presented to the Legislature. The experience of fifteen years had proved that power might be safely exercised by the people in local government, and it was now proposed to leave a large share of power in the counties and townships. To the boards of supervisors all local legislation should be assigned; and thus the business of the people would be brought nearer to them, and they could check wrong-doing at its very beginning. This principle, carried out, would eliminate four-fifths of the business of the Legislature. For this reason the session could be limited even to thirty days, and the daily allowance of members reduced to two dollars. A short annual session would operate as a salutary check upon executive abuses, and not on these alone, but also on abuses in the administrative and judicial departments. What more persuasive evidence of the evil of long legislative sessions than that given

by the thirty-first Congress, whose first session, continued until the 1st of October, was devoted "to compromising a question that has broken up the laws of association, and almost broken the body politic into its original elements." *

The question of long or short sessions, it was said, is not less difficult than that of apportionment. Whatever principle may be arbitrarily agreed upon as the basis of representation, some county in the State is sure to object if the basis is small. The more populous counties will have too many Representatives to please the less populous; and, if the basis is large, the less populous counties will have too few to please themselves. Population was increasing rapidly in nearly all the counties, so that a basis agreed upon in 1850 might be wholly disproportionate in a few years. The old theory, so ably defended by Webster in the Massachusetts convention of 1820, that property is the basis of government, was now referred to only with derision. "It is not geographical territory we seek to have represented," said a member, "but individuals—numbers." A ratio might be fixed by which one-fourth of the population would obtain at least one-half of the representation, and thus practically disfranchise the more populous counties. In the Lake Superior region there were four counties having altogether less than two hun-

* A reference to the thirty-first Congress, first session, and the debates on the compromise of 1850. See Journal of the State Convention, Held in Milledgeville in December, 1850. Milledgeville, R. M. Orme, State Printer, 1850; 34 pages—a review of the political issues of the day.

dred inhabitants.* There was but one solution of the problem. Give every county one vote, whatever its population, and as many more as it contained ratios. The new counties need encouragement and help. Most of the public money had been expended for the old counties. The new were rapidly filling up with immigrants—most worthy settlers, who were as yet too poor to pay heavy taxes.

* The census of 1850 does not give any inhabitants to the counties of Antrim, Alpena, Cheboygan, Emmet, and Presque Isle.

CHAPTER VIII

THE CREATION AND REGULATION OF CORPORATIONS

THE convention was not in possession of an accurate census of the State, but estimates could be made from the number of votes polled at recent elections, and it was on the basis of this information that the apportionment was ultimately made. There was a strong conviction with some members that representation should be apportioned according to the amount of taxes paid, which, they said, was the equitable method of securing an apportionment.* This idea had been dominant thirty years before in Massachusetts, but was combated by those who believed that apportionment should be strictly according to numbers. The more democratic part of the convention were at the disadvantage of lacking accurate information, while the members who advocated apportionment according to the amount of taxes paid by the several counties had the returns of the auditor-general for the year 1849. In the older counties, under the constitution of 1835, there was a great disproportion between the representation and the relative amount

* Compare with the constitution of Massachusetts of 1780, Part 2, Chap. i., the Senate Art. i. Also the constitution of Pennsylvania of 1776, Sec. 17.

of taxes paid. Saginaw County paid half as much taxes, but had only one-fourth of the representation given to Livingston. The convention was reminded again and again that it is one of the political axioms of the American people that representation and taxation go together. The newer counties were increasing in population more rapidly than the older. The party which favored apportionment according to the number of voters relied on the returns for the Presidential election of 1848, which had called out a very large vote. Since that time the immigration of aliens had greatly increased, especially of the Germans. They had settled in the more remote parts of the State, whither even American perseverance had hesitated to go. In Saginaw County the German accession was especially strong. They had brought with them a fair supply of money, of "hard currency," which they had used to good advantage, until it had passed into a proverb, "There is money at Saginaw." It was suggested that perhaps a different rule ought to be adopted for new counties than for old. The newer ones, those in the northern half of the State, and especially in the northern peninsula, were in great measure cut off from the more populous portion. The great mineral wealth of northern Michigan was already attracting attention, and it would be extremely harsh and unjust to discriminate against northern counties, like Chippewa,* because their population fell

* The population of Chippewa County in 1850 was 898.

below the ratio established for the counties of the southern border. Moreover, if biennial sessions were to be adopted, some of the new counties which now had a population below the ratio agreed upon, would, in a year or two, exceed it, and yet they could not be represented until the next apportionment, in 1855.* Much of the produce of central Michigan found a market through Saginaw, and therefore the interests of producers depended much upon the welfare of that county. It would therefore be a better policy to cut down the representation of the old counties for the advantage of the new. It was more important for the State that Saginaw should have one Representative than that Wayne should have ten.

By the committee's report, representation was to be based on the white population, and some members interpreted it as based on the number of electors. A member now proposed that the apportionment should be based on the entire population. If negroes were not to be included, on what principle were minors, aliens, and women counted in the enumeration? Negroes were citizens with acknowledged rights, and if they became paupers they were entitled to support from the county. Even no slave States were so extreme as to wish to exclude them from the basis of representation.† Was Michigan prepared to go further

* For regulation of census by State authority, and apportionments in the States, from 1800–1850, see Chap. xiii. of this volume.

† Compare with the discussion on this subject in Louisiana in 1845. Vol. i., Chap. xiv.

than the States of the South and exclude them? If negroes were to be included, why not the Indians, who formed so numerous a constituency in some of the counties? The report of the committee, however, was not suffered to pass undefended. The old constitution apportioned Representatives and Senators according to the number of white inhabitants; and it might be said that this was not only the rule in Michigan, but, with three exceptions,* the rule throughout the North. Illinois and Iowa, two States that had recently made new constitutions, were cited as a sufficient precedent.† But was precedent in this case good argument? Did it not, as a member at once pointed out, involve Michigan in a gross inconsistency? The measure before the convention contemplated an apportionment of Senators and Representatives, alternately, every five years, on the basis of the national and of the State census. By the Constitution of the United States the number of souls, not color, even in the slave States, was the basis of representation. But was Michigan prepared to adopt the three-fifths feature? Was it applicable to a State?‡ Would it preserve even the show of consistency? A State was compelled to adopt the enumeration of the United States census in the apportionment of members of Congress, but

* Massachusetts, New Hampshire, and New York.

† See Vol. i., Chap. xii.

‡ Compare with the basis of representation in the several States from 1776 to 1800, Vol. i., Chap. iii., and also with the basis from 1800 to 1850 in this volume, Chap. xiii.

why adopt a different basis in its domestic policy? Why garble the national basis? it was asked. To this it was replied that the census of the United States being arranged in columns, and the number of white and colored inhabitants exhibited separately, there would be no occasion for Michigan to garble the census. But the State was compelled to take the whole enumeration * as the measure of its representation in Congress, and it was now proposed to garble and carve it up before making it the basis of home representation. Was this consistent? The national Constitution settled the question of Indians as a basis of representation—"excluding Indians, not taxed," fixed the basis in that respect, and defined precisely who must constitute it. It was consistent, therefore, for Michigan to adopt the national basis of representation for its own Legislature, and it was also absolutely just. But discussion of the color line was premature until the basis of representation and apportionment should be fixed, and the matter was dropped for a time.

It was then proposed to divide the State into thirty-two Senatorial districts, each of which would choose one Senator. The districts should be numbered, and, by a retiring clause, one-half the Senators should vacate office every two years. No county should be divided unless it were equitably

* The population of Michigan in 1850 was 397,554, of whom 2583 were free persons of color. Slavery existed in what is now Michigan until 1830, at which time there were thirty-two slaves in the Territory.

entitled to two or more Senators. But what advantage was this amendment? In Illinois and Iowa the single-district system prevailed, and had suggested the provision for Michigan. Might it not be advisable to insert another section in order to provide for the excess of population, as in the constitution of Illinois?* It was agreed, after some debate, that there should be single Senatorial districts, and that no county should be divided in the formation of a district unless entitled to two or more Senators.

Should there be any limit on the eligibility to membership in either House? It was at first proposed to exclude postmasters, but this was soon stricken out; also the exclusion of notaries public and officers of the militia and of townships. Should the exclusion extend to justices of the peace and to county officers? County officers, it was said, should be excluded because they were officially interested in legislation; and—of greater moment—their services were needed at home. Justices of the peace should be excluded for the same reason. If not excluded, they would be likely to go off and take their dockets with them, and thus cause the interests of individuals to suffer. To this it was replied that justices ought not to be excluded, because it might be a difficult matter in a village to get a competent person to fill the office; therefore, on the ground of public policy, the exclusion ought to be as limited as

* Constitution of Illinois, Art. iii., Sec. 6.

possible. If the justice was doing a large business, he would probably be unwilling to leave it for a seat in the Legislature. Another difficulty appeared at this point. Offices that were elective in some counties were filled by appointment in others. Was it not, therefore, desirable to except from ineligibility officers who were elected in townships?

There was also another difficulty. The functions and duties of county officers were not alike throughout the State. Supervisors and justices of the peace, in many of their duties, were county officers. In some counties the supervisor was the representative of his town in the county board. In small towns it was difficult to obtain proper persons to fill county offices, yet they needed the best men in the town. If to the unprofitable and onerous duties of town officers was added an exclusion from a seat in the Legislature, the administration of town affairs would suffer. "The idea of an exclusion, whether or not men are ambitious for a seat in the Legislature," said a member, "will prevent very many of the best men from participating in the burden of town offices." The purpose of making exceptions to a general eligibility to a seat in the Legislature was, first, to exclude from it persons holding office who, if they were elected to the Legislature, would deprive the public of services which they had at first been chosen to perform; and, secondly, individuals occupying official position ought not to be permitted to use the influence of their offices to aid

in obtaining seats in the Legislature, and thus be led into negligence or unfaithfulness in the performance of their duties. The whole purpose of exclusion, therefore, was to guard the purity of elections and to secure greater efficiency in local government. The local service in the State ought not to be made to suffer by permitting township and county officers to be eligible to the Legislature. It was unanimously agreed that persons holding any office under the United States or the State should be excluded.

The relative merits of annual and biennial sessions were again touched on when the convention now attempted to fix the compensation of members. The evils of the day, and the means proposed for reforming them, are suggested in a provision now submitted — that members should receive three dollars a day for actual attendance, except when absent through sickness, for the first sixty days of the session of 1851, and for the first forty days of every subsequent session, and nothing more. If convened in special session, they should receive three dollars a day for the first twenty days, and nothing more; and should legislate on no other subjects than those expressly stated in the Governor's proclamation. They should receive ten cents for every mile which they should actually travel in going to and returning from their place of meeting, on the usually travelled route; stationery and newspapers, not exceeding five dollars in amount, should be provided for each member during any session. It was at once pro-

posed to change the daily allowance from three dollars to two dollars. The position would then no longer be sought after by interested men, even for the spoils. The people would choose their best men. If the object was to prevent men from seeking the place for the emoluments, it was asked whether it could not be better accomplished by striking out the provision for pay, and place the Legislature on the same standard as the British Parliament. A wealth of argument was condensed in a member's query—Who will be willing to go to the Legislature and sacrifice his time for two dollars a day? If retrenchment was to be carried out as suggested in the legislative and other departments of government, there would be no necessity, said another member, for reducing the pay. It appeared that during the last two years the expenses of the Legislature had been about sixty-nine thousand dollars; the probable expense under the system recommended would be less than seventeen thousand. Thus with biennial sessions the State would save in two years more than fifty-two thousand. The matter of pay, remarked an experienced member, resolves itself into one of dollars and cents. The board and incidental expenses of the member could not be estimated at less than seven dollars a week. He was at some expense for an outfit, to say nothing of the expense of election. If the session was cut down to forty days and the allowance to two dollars a day, after deducting expenses, a member would have left only about a dollar a day

for his services. Who would care to be elected to the Legislature for such a paltry sum? No man could be elected without loss of time and money, for he could not leave his business without a sacrifice, even if the session were for ninety or one hundred days. "Three dollars a day," said a member, "may be necessary for those who cannot wear pantaloons without straps,* and who must have their wine dinners every day at the Benton House. Members are not compelled to dress finely, and there are cheaper boarding-houses in town." Two dollars were enough. So thought another member, who declared that he could board himself and family at Lansing for a dollar a day. The State should not hire men and pay them extra. Capable men could be had at two dollars a day. Perhaps there would not be so much fuss at election time, but the State would secure good men.

On the 19th, the committee on education reported an elaborate system of free schools, supported by taxation, and under the care of a superintendent of public instruction elected for a term of two years. The school lands given to the State at the time of its admission had already produced a school fund, and the proceeds arising from further sales were to be added. The income arising from this source should be distributed on an equitable basis among the primary schools. In

* In allusion to a fashion of the day by which the trousers were held down by boot-straps, a style familiar to us in the character of "Uncle Sam."

every school district a primary school should be established for at least three months in the year, free to all children between the ages of four and eighteen. Any deficiency that might exist after the distribution of the primary-school fund should be supplied by a tax levied upon the whole taxable property of the townships and cities in which the deficiency existed. In these schools the English language, and no other, should be taught. Six regents of the university should be chosen to serve for a term of six years. At the first general election two should be selected for a term of six years, two for four, and two for two years. At their first meeting the regents should elect a president of the University of Michigan, who should be *ex officio* a member of their board, and preside at their meetings. The proceeds from the sale of lands granted by the United States for the support of a university, and funds accruing from any other source, should constitute the university fund. There should also be elected three members of the State Board of Education, to hold office for the term of six years. At the first election one member should be elected for two years, one for four, and one for the full term. Of this board the superintendent of public instruction should be *ex officio* a member, and he should also fill the position of secretary. The board should have the general supervision of the State normal school. The proceeds from all lands appropriated for the support of this school should constitute a perpetual fund. By every suitable means the Legislature should

encourage all scientific and agricultural improvements; it should establish an agricultural school, and in connection with it maintain a model farm; and it should also provide for founding at least one library in each township, which library should receive all moneys paid in exemption from military duties and all fines for breach of the penal laws.

The system of education thus outlined was among the first of its kind, and the most elaborate, complete, and, as time has proved, the most efficient in its workings of any adopted by an American commonwealth. Every measure proposed for the wise execution of the plan was cheerfully and enthusiastically supported by the convention. The apathy towards common-school education characteristic of most of the older States has never existed in the West. As the Territories were organized, Congress generously provided for a well-endowed educational system by making large grants of public lands. This enabled the Western States to lay a broader foundation for their educational system than has existed in the East.

On the following day the committee on corporations reported. The subject itself was somewhat new in our constitutional history. The earlier State constitutions do not refer to it. The half-century now closing had witnessed a phenomenal multiplication of corporations of all kinds. Of these the most numerous were of a financial character. The evil mostly complained of was the creation of corporations by special acts of the

Legislature. Hereafter in Michigan they should be formed under general laws only. In order to prevent further abuses in banking, no law for banking purposes should go into effect until submitted to a vote of the electors of the State at some general election and approved by a majority of votes cast. A law thus submitted and rejected could not be passed again until a number of years had elapsed. Hereafter, the officers and stockholders of a corporation organized for banking purposes should be individually liable for the bank-notes and paper credit which the corporation circulated, and for all its debts. The bills and notes put in circulation should be registered according to law, and ample security in State stocks or bonds of the United States should be required for the redemption of such bills in specie. In case of the insolvency of the banking institution, the bill-holders should be preferred creditors. The Legislature should have no power to pass a law sanctioning in any manner the suspension of specie payments by any person or corporation issuing bank-notes of any kind. The Legislature should not have authority to amend any act of incorporation unless with the assent of two-thirds of the members of each House; nor should any act of incorporation that had been granted hitherto be extended. This provision, however, did not apply to municipal corporations. To the stock of any corporation the State should not be a subscriber. All charters in force should be subject to repeal or amendment by the Legislature

after the year 1880, and no new corporation, except municipal, should be created for a longer period than thirty years.

The report of the committee on the judiciary followed. The supreme and circuit courts should compose the superior courts of the State; probate courts, the justices' courts, and local courts of criminal jurisdiction in cities, established as the Legislature might think necessary, should constitute the inferior courts. Three judges should compose the supreme court, two of whom should form a quorum, and the concurrence of two should be necessary to every decision. The dissenting opinions should be given in writing over the signature of the judge, with the reasons for his dissent. An innovation was instituted in making the judges of the supreme court elective instead of appointive officers—an innovation which had been gaining strength since the election of Thomas Jefferson, and especially since the overthrow of the Federal party. The term was set at six years. The supreme court should hold terms annually in each judicial district, of which there should be five, and in each of which a circuit judge should be elected for a term of six years. The number and the boundaries of the circuits might be changed by the Legislature at its discretion. The old system of fees and perquisites of office for the judges, so long in vogue in the colonies, had been gradually abandoned by the States, and in their place the judges received a fixed salary. Michigan, continuing this reform, now provided that

judicial salaries should be payable quarterly. The judges of the supreme court should appoint a reporter. In every county a circuit court should be held at least once a year, the number of terms of court depending upon the population of the county. The county clerk should be *ex officio* clerk of the circuit court of the county, and also of the supreme court when held in it. Appeals and writs of error would lie from the circuit court of any county to the supreme court held in the circuit including the county, and, with consent of parties, to the supreme court held in another circuit. A probate court should be organized in each county, and its judge be elected for four years. Whenever a vacancy occurred in the office of judge of any of the courts it should be filled by appointment of the Governor, the appointee continuing until his successor should be elected. To facilitate judicial business, the Legislature might provide for election in each county, of one or more persons invested with judicial power not exceeding those of a judge of the circuit court at chambers.

All the statute laws, and such judicial decisions as might be deemed expedient, should be published separately by the authority of the Legislature, but all laws and judicial proceedings should be free for publication by any person. Each township should have four justices of the peace, elected for four years. If a judge or a justice of the peace should remove beyond the limits of the jurisdiction in which he was elected, his office

should thereby become vacant. Through the great opposition that was manifest, the committee on the judiciary made no recommendation for the appointment of commissioners to codify the laws of the State, although many members had expressed a desire that this be done. It was said that the laws in force at any period were better adapted to the wants of the people than any revision which a committee could produce; for the laws were the result of trial and correction, while a revision would be only the labor of a commission. No man could draw up a code suitable to all the various wants of the people. Michigan had already suffered three inflictions of the kind, and they were among the greatest calamities which had visited her. The revision of 1838, with the session which adopted it, cost the State about ninety thousand dollars. Eight succeeding sessions of the Legislature made improvements, costing about fifty thousand dollars a session, so that the laws in force in 1846 had cost the people between four and five hundred thousand dollars; and yet, with all the improvements suggested during these six years, these laws which the people had adopted, tried, and approved, were exchanged "for the results of a few months' labor of one man's brain." Either the laws which were succeeded by the revision of 1846 were worth the half-million dollars which they had cost, or the State had been unwise in employing the various State Legislatures to enact them, and it was continuing to be unwise in using Legislatures for similar purposes. The first objection to a

code was the popular ignorance concerning the new laws; the second, its inadaptation to popular wants and interests. The Legislatures, therefore, had been overwhelmed with petitions for amendments; sessions had been prolonged, voluminous session laws had been passed, and taxes increased. All this accumulation of evil, charged against the Legislature, was really attributable to the code.*

In the organization of the Legislature the committee had reported a clause forbidding it to pass any act, or to grant any license, for the sale of ardent or intoxicating liquors as a beverage. Sumptuary legislation of this kind had at times been agitated in the older States for a quarter of a century, but Michigan was among the first to discuss it in a constitutional convention. That the committee should report such a clause was evidence of a significant phase of public sentiment on the liquor question. A member at once proposed to amend the clause by excepting from the exclusion all licenses for the sale of liquor for mechanical or medicinal purposes. The support which the amendment received may easily be anticipated. The evils of intemperance were portrayed, as they have been portrayed to every generation. The liquor question, in the opinion of many, was becoming an evil as great as slavery. Indeed, those who demanded the prohibition of the liquor traffic claimed that they were appealing

* See acts of the Michigan Legislature on revision of the laws, March 12, 1844; May 18, 1846; February 27, 1847; January 26, 1848. See constitution of 1850, Art. xviii., Sec. 15.

for the enfranchisement of a far greater number of human beings than those that were ever held in African slavery. Should the sovereignty of the State be identified with the traffic in spirituous liquors or with their manufacture? No longer should the traffic receive the apparent sanction of law. No longer should the people of the State be guilty of an immoral act of this kind. The State should not be a partaker of the wages of sin and "derive a portion of its revenue from the tears and wretchedness of the victims of intemperance."

Nor was there lacking the usual reply — that the standard of right and wrong cannot be fixed for any specified time, that it varied even under divine dispensation, that Noah was fond of wine, that the apostle thought a little of it good for the stomach's sake, and that it was used on most communion-tables. The agitation, however, had begun. In every constitutional convention during the next fifty years the liquor question was to come up for solution. On the 1st of August an effort was made to submit a separate amendment prohibiting the manufacture and sale of liquor in the State. This suggestion of the treatment of the question by future conventions was laid on the table and ordered to be printed, but was not again discussed.

On the 22d the committee on suffrage and elections made its report. Only white male citizens above the age of twenty-one years who had resided in the State six months preceding the election should be entitled to vote. A provision—

one quite common to State constitutions — was added, which excluded from the right of suffrage persons convicted of larceny or arson, or any infamous crime, or who made or were interested in any bet depending upon the result of an election, and all persons *non compos mentis.* The exclusion also extended to United States soldiers and seamen.*

The report of the committee on corporations, which made it difficult to establish a bank, had not received the unanimous support of its members. On the 24th a minority report was submitted. To all who are familiar with the history of money delusions in the United States the report will have a familiar sound. Taking into view the peculiar circumstances of the State—that it was nearly surrounded by navigable waters, which also extended into other States, with a coast extending more than eighteen hundred miles, lined with inexhaustible fisheries; with soil unsurpassed in fertility and in the variety and extent of its productions, with vast forests of valuable timber, with unlimited mineral wealth in mines of iron and copper, with beds of coal and plaster, and salt springs—the conclusion was irresistible that a vast trade must grow up which would demand a corresponding increase of circulating medium. Was it not, therefore, the part of wisdom and sound policy to establish such a system of banking as would induce the investment of foreign capital in

* See the qualifications for electors, 1776 to 1800, in Vol. i., Chap. iii., and from 1800 to 1850, in Vol. ii., Chap. xv.

the State, and shut out from circulation bills of the less reliable banking institutions of other States?* Therefore, a system of banking founded on a specie-paying basis, with ample security for redemption in specie of all bills put in circulation, seemed necessary. Banking corporations might be formed under general laws by a vote of two-thirds of the members of both Houses, but it should not be necessary to submit proposed bank laws to a popular vote for ratification. The Legislature should not permit the suspension of specie payments by any person or corporation issuing bank-notes of any description. These should be registered and be supported by ample security for their redemption in specie. The security should consist in stocks or bonds of the United States, or of any commonwealth, which should be deposited with the State treasurer, and be, at least when offered, equal to the amount of bills or notes registered for circulation. The stockholders should be personally liable for the bank-notes and paper credits issued by the corporations of which they were members. Banking institutions thus established should pay to the State a tax of at least one per cent. per annum on their paid-up capital stock. The bill-holders should be preferred creditors. Both reports on corporations were modelled on the provisions on the same subject in the constitu-

* It will be remembered that this was during the regime of State banks, when their circulation depreciated as the distance from the bank of issue increased, and it was almost impossible for a business man to know what State-bank currency had any value whatever.

tion of New York of 1846,* which was also the precedent for the national bank act of 1863.

During the half-century now closing, public opinion had greatly changed respecting the rights of married women. At the opening of the century a married woman's rights were merely those to which she was entitled under the common law. In a democracy these common-law rights were bound to prove chafing restrictions, and a demand for the extension of her rights was sure to be made. In the older States the demand was less vehement than in the new. The East differed from the West in its practical recognition of the equality of the sexes. The vicissitudes of frontier life often compelled a woman to bear burdens usually borne by men; there she was often compelled to assume all the care of a family. Her only resource was the homestead and her own labor. The misfortunes of life are somewhat harder to bear in a new country. There gradually grew up in the West a conviction that the homestead should be exempted from forced sale for debt, in order that the wife and children might not suffer. It was now proposed in Michigan to make exemption of personal property of the value of five hundred dollars, and also of the homestead, which might be forty acres of land, or any city, village, or town lot.† For the further protection of the wife, the husband should

* Art. viii.

† See acts of March 11, 1844, and April 3, 1848; they were incorporated in the constitution of 1850, Art. xvi.—a good illustration of one fruitful source of constitutional provisions.

be declared incapable of disposing of the homestead by any deed of conveyance without her consent. The exemption should also accrue for the benefit of the children, for it was now proposed to relieve the homestead from the payment of the debts due at the death of the owner in all cases where any minor children survived him. Where there were no children, all rents and profits should be paid to the widow during her widowhood, provided she was not the owner of a homestead in her own right.

A suggestion made early in the convention was also incorporated in the clause providing that a woman's real and personal estate acquired before marriage, and all property to which the wife might afterwards become entitled, should remain her property and be free from liability for debts, obligations, or engagements made by her husband. On the 17th of July the same committee submitted an entirely different report—that the whole system of exemptions was essentially wrong, because its consequences subverted personal economy and commercial integrity. Property being the legitimate source for the payment of debts, should not be subject to conditions which would destroy the obligation of contracts. The committee now proposed to release from liability for the debts of a husband all property acquired by a woman before her marriage, or by inheritance, gift, or devise afterwards. But her property should be liable for her own debts. This second report, however, did not receive support.

The injustice which excluded persons of color from the suffrage, and at the same time made them responsible for military service to the State, had led the committee on the militia to report a clause constituting the militia exclusively of all able-bodied white male citizens between the ages of eighteen and forty-five. An attempt was made to obliterate the color line, because the clause imposed duties on the white population which were not borne by the black, and which exempted the blacks from service that the white population were forced to perform; but the convention refused to make the change. A provision taken from the constitution of New York* was added, excusing from militia service all inhabitants of the State who from scruples of conscience were averse to bearing arms—a provision, however, usually found in State constitutions.

Early in the session a resolution had been submitted and referred to a committee, that the Speaker of the House should be elected by popular vote. The resolution was now proposed by its author† as an amendment to the clause providing for the election of the Governor and Lieutenant-Governor. Popular election, it was said, would give the Speaker ample time and opportunity to qualify himself for his duties, and the election itself would be a sure guarantee that he was a competent per-

* Constitution of 1846, Art. xi., Sec. 1. The amendment was suggested by Comstock, a farmer and native of New York.

† Calvin Britain, a farmer and native of New York, representing Branch County, and residing in the town of Quincy.

son. In case of the removal or death of the Governor and the Lieutenant-Governor, the executive authority would not fall into the hands of the President, for the time being, of the Senate, but would devolve upon the Speaker of the House, an officer chosen directly by the people. Would not this manner of choosing the Speaker transform him from a legislative to an executive officer? it was asked. All had agreed that the powers of government should be divided; was not this proposition one that would violate that division? The Speaker, it was replied, would then occupy a position similar to that of the Lieutenant-Governor. Moreover there was another reason for the change: by electing the Speaker, no county would be deprived of its Representative. But would it not be practically creating another office and making additional expense to the State? Did not everybody know that the county from which the Speaker came was the best represented in the House? Though the amendment was lost, it intimated a current phase of the evolution of democracy in America—that all officers should be chosen directly by the people. An effort was made to require the same qualification for the Speaker as for the Governor and Lieutenant-Governor. By requiring the age of thirty years the State would be guarded against "young men of peculiar greenness. * * * The education of a new hand for Speaker cost the State annually ten thousand dollars." To this it was replied that while it was true that persons were sent to the Legislature whose education, to

make them competent Speakers, would cost more than that sum, yet there were always persons competent for the office; and the member added that he had once had the honor to preside over the House as Speaker himself, and he was sure it had not cost the State that amount for his education. The proposition was a new one, and had not been freely discussed in any convention, but it was thought to afford a remedy for abuses, and the amendment was adopted. The question then arose whether five years' residence was sufficient to secure a suitable candidate for Governor. With the immense tide of immigration pouring into the State; persons of foreign birth held the balance of power between the two great political parties in some of the counties, and the day might not be far distant when it would be entirely in their power to control the State elections. While any competent naturalized citizen might perform the duties of the office, could a foreigner prepare himself for the duties of Governor in less than ten years? But public sentiment would not tolerate any discrimination of this kind, and the suggestion was lost. So, too, was another, declaring persons over seventy years of age ineligible to the office of Governor and Lieutenant-Governor.

Among the powers which, by the committee's report, were granted to the Governor, was that of convening the Legislature, or the Senate only, in extra session. The provision respecting the Senate was struck out as an unnecessary one, because under the constitution which the convention was

framing "all officers would be elected by the people, and as the Governor would only fill vacancies, there could be no necessity for calling the Senate together." A slight evidence of the growing distrust of the people towards the Senate was manifested in a change made in the provision for succession in the office of Governor. The Speaker of the House, and not, as is usual in the States, the President of the Senate, should succeed in case of the impeachment, death, or incapacity of the Governor and Lieutenant-Governor; and the Speaker was declared, together with the Governor and Lieutenant-Governor, ineligible to any office or appointment from the Legislature for the term for which he was elected. In committee of the whole there was also adopted the amendment that in case of vacancy in the office of Speaker the electors should choose another person. A discussion then followed of the amendments made respecting the Speaker. The House, it was said, was better qualified than the people to elect its Speaker, for the members would have a more intimate knowledge of the candidates. A popular election for the office of Speaker was no more advisable than a popular election for the position of a school-master. It was replied that the Lieutenant-Governor was *ex officio* President of the Senate, and was elected by the people. Why should not the Speaker of the House be elected in the same way as the Lieutenant-Govneror? If the House elected its Speaker, why should not the Senate elect its President? The Lieutenant-Governor

was at best only a useless officer, and his salary ought to be saved to the tax-payers.

Nothing was said of the paramount principle in government, that in the mechanical arrangement of government, adequate provision must be made for continuity in administrative functions. No one remarked that even if the Lieutenant-Governor were called a useless officer, he might prevent serious confusion in the State in case of the death or incapacity of the Governor. It was now urged that popular election of the Speaker would not only make that officer responsible to the people, but would secure an experienced and capable official to the House, would relieve it from the dictation of designing men, and would secure the appointment of such committees as the public interest demanded, and also provide an officer chosen by the people who would perform executive duties during the absence or disability of the Governor and Lieutenant-Governor. Amendments embodying these ideas were now offered, but were rejected, though only by a majority of twelve votes.* The argument for the age qualification had little weight with the convention. Experience and mature judgment, it thought, were not assured merely by the age of thirty years. The West was explored, settled, and controlled by young men, and the convention was not disposed to exclude them from public office, as they had been excluded earlier in the century in the older States. Had not

* Fifty to thirty-eight.

Talleyrand, Pitt, and Napoleon—and, indeed, Hamilton and Clay might have been added—had they not demonstrated that youth is no disqualification? But by a vote of sixty to twenty-eight the convention refused to make the age qualification of the Governor and Lieutenant-Governor less than thirty years, and in this decision continued the practice of most of the States of the Union.

When the report of the committee on education came up for discussion on the 26th, an effort was made to amend by abolishing the age limit of eighteen years and make the schools free to scholars of any age; also that districts which failed to raise the local school tax should not receive any portion of the State tax or interest of the primary-school fund. The purpose in removing the age limit was to provide instruction in the lower schools sufficient to prepare for college. Nine-tenths of the people, it was said, would never attend any other than primary schools, and therefore the opportunity should be given them for securing a college preparatory training in these schools. A difficulty would arise also if the system proposed by the committee were adopted—a State tax to defray all the common-school expenses would pay the charges in some districts, while in others, where there were but few children, it would not. In those districts in which the school population was small there would be a demand for good schools, and yet by the system proposed there would be no authority for supporting them. These districts, therefore, ought to be authorized

to raise a tax for the purpose. In resorting to a district tax there would be neither injustice nor impropriety; but there would be impropriety in taking town or district taxes for the support of the school. If a township had one hundred scholars, and the law authorized a tax of one dollar each, it must be distributed among the number of schools in the district. Such a law had already been tried and had created ill feeling. Another law authorized the amount to be raised in the district, and also worked injuriously. If the principal part of the fund was raised by a State tax, there would be many towns whose schools were not organized, and those ought to be taxed for the benefit of the whole. In unorganized districts property-owners would escape unless there was a State tax. Such a tax, in feeble settlements, would assist in organizing schools. The question was raised whether the convention was as well prepared as the members of the Legislature to establish a system of education. An insurmountable obstacle existed in the union schools built and supported by several districts; another difficulty would be the prohibition of any language except English. If the union system was to continue, this prohibition fixed in the constitution would be a serious matter, for in many of these districts the German language was also freely used, and German immigration was increasing.

The amendments now proposed to the article as reported by the committee were submitted by Leech, a teacher, who was a native of New York.

They proposed a system similar in character to that in force in New York. Walker, a native of Vermont, at once objected to the amendments as involving ingredients of discord which would destroy the schools of the State. He said that he had in his possession a letter from the deputy-superintendent of public instruction of New York, saying that if any attempt was to be made to change the school system of Michigan, it should avoid raising any portion of the tax in the school districts, as such a provision operated as an "apple of discord" in New York. For this reason the committee had avoided the recommendation. All that was essential to be placed in the fundamental law respecting education was the establishment of the schools, their support by a primary-school fund set apart for the purpose, with whatever additional expense might be incurred to be raised by a State tax, and the maintenance of a school in every district for a minimum time. The language difficulty might be removed by providing that instruction should be conducted in the English tongue. This would not prevent other languages from being taught. A large number of immigrants were locating in the State, and it was wise to have them acquire the English language in the shortest time. Though these immigrants were anxious to retain their own language, even to the exclusion of English, it was an evil that should be remedied.* It was de-

* The member, however, was here slightly in error, as foreigners who have immigrated to this country have generally shown great eagerness to acquire the English language and to have it

cided not to give the districts the right to levy a school tax, but that the deficiency, if any existed in the districts, should be made up from other sources. It was not determined whether these should be a State tax or an appropriation by the Legislature.

displace their own. At least this has been true in the older States, and is doubtless true of the whole country. There are marked exceptions, as in the German communities of Michigan and Wisconsin, in the Swedish communities of Wisconsin, Minnesota, and the Dakotas, in the Italian communities of New Jersey and Illinois, in the parts of Pennsylvania inhabited by the so-called Pennsylvania Dutch, in French Louisiana, and that part of the United States once Mexican soil. As late as 1840 the laws of Pennsylvania were published in German and in English; the debates of the constitutional convention of that State, of 1838, were published in both languages. The constitution of Colorado of 1876 provides for the publication of the laws in English and in Spanish. In Arizona and in New Mexico the laws have been published in both these languages; in Louisiana they were published in English, French, and Spanish, as late as 1850, and the journals and debates of constitutional conventions in that State were also published in these languages as late as 1852.

CHAPTER IX

THE RIGHTS AND PRIVILEGES OF CITIZENS

It will be remembered that Native-Americanism was approaching the height of its strength in these times, especially in the slave-holding States,* and its spirit was abroad in Michigan. One member proposed to deny the right to vote to foreigners who, after residing within the State five years, and being naturalized, were unable to read and speak the English language. In the county of Saginaw, said the member who made this proposal,† were over a thousand Germans. They desired to organize school districts, and there were not enough English-speaking citizens among them to fill the offices. Unless some temporary provision were made in the constitution for these Germans to hold office and vote, they would be unable to enjoy the privileges to which they were entitled. They had braved the dangers of a long journey in order to make Michigan their home; yet care should be taken that they were not allowed to abuse their privileges. There was a disposition

* For an account of Native-Americanism see Vol. i., Chap. xiii., and pp. 451–459; also pp. 103, 105, 151, 157 of this volume.

† J. G. Sutherland, a lawyer and native of New York, representing Saginaw County, and from Saginaw City.

among them to settle in communities, to continue their foreign habits, and to maintain their own language. It might take generations to adapt them to the English language and to the genius of American institutions if they were allowed to indulge their foreign sentiments. Unless the English language was made the sole medium of instruction in the schools, these Germans would speak and teach their own language — indeed, would keep schools solely for that purpose. By giving them five years in which to learn English, they would have meanwhile the right of voting and filling offices, and as they were inclined to be industrious and peaceable and to learn our language, they would probably at the end of that time be fully qualified to hold office. A member remarked that the amendment would cause many difficulties. Who was to decide when a man knows the English language? He is supposed to speak it if he can communicate his ideas even in a broken manner. The amendment was impracticable. Many of the immigrants from Germany and Holland spoke German and French, and some of them spoke English. A large portion of them were well educated. Many who were now day-laborers were good Latin scholars. The Prussian system of schools was better than ours, because in Prussia there was opportunity to learn music and the languages, and education was compulsory. The whole body of Germans in the State could read and write. It might not be well for these foreigners to learn the English language too fast.

It was best to keep them honest as long as possible. Was not the period too long at best, and was it not unjust to require them to read and write the English language? Many of the old French inhabitants of the State, who spoke English but imperfectly, had never been able to read or write it, and probably never would. Another member thought it best to let these persons work out their citizenship under the laws of the United States, believing that those who wished to become voters would prepare themselves accordingly. If an intelligent foreigner wished to become a citizen he would file his intentions, and meanwhile study our institutions and become better able to vote than if there was no qualification. But, it was asked, why discriminate between foreigners coming at different times? Why should those already in the State have privileges which later-comers were to be denied? Was the complaint of the length of the probation required of foreigners a just one? An American boy might be as well prepared to vote at sixteen years of age as a foreigner after two years' residence in the State. Why keep our boys in a state of probation and put the foreigners ahead of them? The amendment was rejected.

It was then proposed to give the right to vote to every white male of age, who had resided in the State two years preceding the adoption of the new constitution, having declared his intention of becoming a citizen of the United States. This would meet the objections raised to the exclusion

of foreigners from voting unless they went through the forms prescribed by the naturalization laws of the United States. A discrimination might be made with propriety between those who had been in the State two years and those who had arrived since. At least the State should guard its privileges by requiring them to take the oath prescribed by the United States, that they intended to become citizens. But was not exclusion in any form a blow "struck at the very root of the institutions of our country"? When the first constitution of the State was adopted the right to vote was given to every white male citizen, above the age of twenty-one years, who had resided in Michigan six months. This liberal provision had brought many worthy citizens to the State. Objection was made to shortening the time required of immigrants lest the rights of the English-speaking population might be voted away by foreigners. The right of suffrage should not be made too cheap. If foreigners had to wait five years in order to vote, they would appreciate the right and be less likely to be imposed upon by designing demagogues. It will be remembered that this convention assembled at the time when the United States was receiving its first great body of immigrants, whom the revolutions of 1848–49 in Europe had practically driven from their homes.*

* From 1841 to 1850 the number of alien passengers who arrived in the United States was 1,713,251. Of these 1,047,763 were from the United Kingdom; England and Wales, 33,353; Scotland, 3712; Ireland, 780,719; 434,626 came from Germany, 77,262 from France, 41,723 from the British North American provinces, 13,903 from

Throughout the free States there was a generous welcome to these new-comers; in the slave-holding States they met with equally enthusiastic discouragement. It was now remarked that if immigrants were excluded from voting and from the right to hold office, and at the same time were taxed, not only would they be treated unjustly, but the State would neglect to hold out inducements for a better class of immigrants from Europe; and

Norway and Sweden, 8251 from the Netherlands, 4644 from Switzerland, 1870 from Italy, 656 from Russia and Poland, 539 from Denmark, 35 from China, and 81,979 from other countries. In 1850 the foreign-born population of Michigan was 13.76 per cent., or a little more than one-eighth of the population of the State. At this time the foreign-born population of Ohio was 11.2 per cent.; of Illinois, 13.14; of Wisconsin, 36.18; of Minnesota, 32.54; of Iowa, 10.90; of Missouri, 11.23; of Indiana, 5.62; or an average of 12.04 in the North Central division of States. The average for the United States at this time was 9.68. The highest percentage was in Wisconsin; the lowest in the free States was in New Hampshire, 4.49; and in the slave States in Tennessee, .56. In Kentucky, where there was strong opposition to foreign immigration, the percentage was 3.2. In Louisiana the percentage was 13.18, and there the feeling towards foreigners was as cordial as in the North Central States. In California the percentage was 23.55, and, as the Monterey debates show, there was no disposition to exclude foreigners from the State. It may be accepted as a law of migration that in those States in the Union at this time in which there was the greatest number of foreigners there was the least disposition to exclude them, and that the most vigorous and successful efforts to exclude them were made in the slave-holding States, Louisiana excepted. In the North Atlantic division the average percentage of foreigners was 15.37 of the population—in Maine, 5.46; New Hampshire, 4.49; Vermont, 10.73; Massachusetts, 16.49; Rhode Island, 16.20; Connecticut, 10.29; New York, 21.28; New Jersey, 12.35; Pennsylvania, 13.12. The various discussions of the suffrage in State constitutional conventions bring out the predominating sentiment towards foreigners. See Census of 1890, Part i., Population, pp. lxxx-lxxxiv.

such worthy people were greatly needed in the almost unpopulated northern counties. The convention left the subject at this point with the disposition to make liberal provisions for inhabitants of the State born in foreign lands.

The question of the suffrage could not be settled without arriving at some conclusion as to free persons of color. The desire to strike out the word "white" from the qualification of voters was strong; as a member said, the petitions on this subject numbered more than six times as many as on any other presented to the convention. It may seem anomalous that a constitutional convention in a free State should insist on retaining the discriminating word; still the history of the suffrage to this time shows almost as much antipathy in the free States to free persons of color voting as in the slave States. Yet the arguments in the Michigan convention differed somewhat from those in the recent convention in Kentucky. The Michigan convention, said one of its members, is a Democratic convention, and if the spirit as well as the name of democracy is to be in the ascendant, how can the measure fail? The attempt to extend to a class of citizens a right of which they had long been deprived, and to which they were as much entitled as any member on the floor, was emphatically in accord with Democratic principles. Why, then, should its friends anticipate defeat? To foreigners who came into the State were extended the privileges of naturalization and citizenship. They were required to bear their

proportion of the expenses of government, yet these burdens were not imposed upon them without granting them all the rights and immunities of native-born citizens. All who bore these burdens in the State should be represented, and there should be no discrimination on account of color. If the foreigner was allowed to vote, why not the free negro? The condition of the free colored population of Michigan was well presented in a petition sent up from Wayne County—that free persons of color were as a class peaceable, industrious, and rapidly improving in condition; that though subject to taxes, and all the burdens of government, they were excluded from any participation in its administration. The mere color of the skin seemed a very arbitrary rule for granting or withholding the elective franchise, and taxation without representation had never been considered a republican doctrine. For these reasons the franchise should be extended to them under such qualifications as the public good might require. If objection was made to the African because of his lack of intellectual capacity, the instances of Hannibal and of Alexandre Dumas, the first on account of his victorious arms, the second by his brilliant intellectual talents, were a sufficient reply to the charge. Why should the color of the skin disqualify more than any other physical peculiarity? Whenever the question of the extension of the suffrage to negroes had come up in the convention the objection had always been raised that extension of the right to vote

meant that the State granting it would be flooded with free negroes. This was the argument in New York in 1821, in Pennsylvania in 1838, in Louisiana in 1845, and it was now repeated in Ohio and Michigan. As Hannibal and Dumas were cited as a sufficient answer to the one objection, the history of the suffrage in States allowing free negroes to vote was cited as a sufficient answer to the other. Since 1792, suffrage in New Hampshire had been unrestricted. Connecticut, less liberal, had restricted the right to vote to white persons. In 1800 the free colored population of New Hampshire was eight hundred and eighteen; ten years later it had increased to nine hundred and seventy, or nineteen per cent. In 1800 the free colored population of Connecticut was five thousand three hundred and thirty, which ten years later had increased twenty-one per cent. In 1820 the free colored population of New Hampshire was nine hundred and eighty-six, showing an increase of only two per cent. in ten years, during which time in Connecticut that population had increased nineteen per cent. In 1830 the free colored population of New Hampshire was six hundred and four, or thirty-three per cent. less than ten years previously, while in Connecticut at this time it had increased three per cent. In 1840 the free colored population of New Hampshire showed a loss of over ten per cent., while in Connecticut it had increased, though only one per cent. Thus during a period of forty years the free colored population of New Hamp-

shire fell from eight hundred and eighteen to five hundred and thirty-seven, a loss of thirty-three per cent., while in Connecticut it increased from five thousand three hundred and thirty to eight thousand one hundred and five, or about fifty per cent. "It is climate that makes the difference," remarked a member who opposed the extension. "This is just what I wanted to prove," was the reply. Some other influence than the elective franchise determined free persons of color in their choice of a home. They were governed in their choice by the same considerations which had influenced the white population of Michigan in their migration from Eastern States. The small number of free negroes who would make Michigan their home would be superior in ability and principles to the general mass of their race, and from such men the State had nothing to fear. To this it was replied that as long as there were two races they could not amalgamate. If the blacks were given the right to vote, other rights must be given them. Natural rights differed essentially from legal or from political rights. The right of suffrage was a conventional privilege. Though justice should be extended to all men, the people of Michigan were not bound to disgrace themselves in the social circle and amalgamate or associate with negroes. If the right to vote was given them, then they must be given the right of association in the churches and in the Legislature. "Why not, then, give our daughters in marriage to their sons and amalgamate the races?"—a ques-

tion triumphantly asked in every debate on this subject.

The reply is already familiar to us. To extend political privileges to the colored race did not imply that they were to be received as intimates in white families, or that the races were to be amalgamated. Were there not ignorant and vicious white men to whom a wise father would not give his daughter in marriage? The question of amalgamation did not apply. The law of climate was not clear to the majority of this convention; they were not sure, as a member said, that if the word "white" was struck out, the whole State would not be clothed in mourning—that as the black man came in, the white man would recede, and that the beautiful peninsula of Michigan would be peopled with black bipeds, a species not equal to the white. What member would deny that the God of nature had stamped the black man with inferiority? The Declaration of Independence referred only to the white man. Jefferson and Washington owned slaves. The Constitution of the United States was based on slavery. One member at this point expressed his belief, and it was the belief of thousands in the free States, that the black man had been providentially brought to America to be educated to some great purpose, and that when the race was raised to a certain state of civilization it would go back to Liberia and find the sources of the Nile, whose beginning the barbarous Africans had never yet been able to discover.

When we find in the middle of the nineteenth century such ideas as this expressed in a constitutional convention of a free State lying on the northern frontier, it is not difficult to understand in some measure the fearful hold which slaveocracy had upon the institutions of our country at that time. As we read the debates in free States when they made their fundamental laws, especially after 1820, it is not difficult to understand with what assurance Clay and Webster, and other public men far inferior in experience, intellect, and influence, supported the compromises of 1850.

Of the arguments advanced against extending the suffrage to free persons of color the most persuasive was the one commonly heard whenever the subject came up—the fear of an African invasion. Many humane persons in the South would gladly emancipate their slaves if they could conveniently find a home for them. If Michigan extended political privileges to them it would insure an overwhelming influx of the race. Because Massachusetts and New Hampshire long before had given them the elective franchise, and yet their colored population had not greatly increased, was no evidence that Michigan by doing so would have the same experience. The economy and industry of New England were too much for the colored people, who would rather submit to slavery in the South than work in Massachusetts. The duty of the convention was to advance the interests of the State, not to injure its people merely to gratify a foolish sentiment towards an inferior

race. If given the elective franchise, they would become the creatures of ambitious demagogues and swell evils of which complaint was already made. Evidently the convention was divided, though with an earnest minority in favor of the extension of the suffrage. The members who had opposed now demanded that the question be submitted directly to the people, and with this suggestion the discussion for the present ended. But on the 14th of August it was decided that the question of admitting free colored men to the suffrage should be submitted to the electors as a separate amendment for their adoption or rejection.

On the 28th the committee on county officers and county government made its report. The subject, though an old one, was never before so elaborated as now. Each clause in the report was intended to correct some abuses and to make local government more efficient. Each county should be a body corporate, and none should be reduced to an area of less than six hundred square miles. The county officers should consist of the county sheriff, the county clerk, the county treasurer; also the recorder of deeds, the county surveyor, the prosecuting attorney, and one or more coroners, all chosen directly by popular vote once in two years. The sheriff should be incapable of holding the office for a longer term than four years in any six, should be required to renew his security from time to time, and in default of this his office should be deemed vacant. The county

should never be made responsible for his acts. For each organized township there should be a board of supervisors with powers uniform throughout the State. Incorporated cities should be represented in the board of the county in which they were situated, as the Legislature might direct. The powers of the board were to organize new townships and grant privileges of constructing bridges, mill-dams, and roads, and to fix the compensation of various county officers. But no township should be organized with less dimensions than that under the United States survey —six miles square. The county seat, once established, should not be removed unless with the consent of a majority of the board, and also two-thirds of the electors of the county. For carrying out these powers, the board of supervisors might borrow money or raise it by taxes; but the amount was limited by law. Any greater amount must be authorized by the vote of a majority of the electors of the county. When, eleven days later, the discussion of the report began, objection was made to the minimum area of counties; but the report was sustained when a member of the committee gave the reason for the provision—that sixteen townships contained five hundred and seventy-six square miles, and that the committee thought no county ought to have fewer than sixteen towns.* The provision for coroners was struck out, because, as a member said, there would be no duties for

* In Michigan, as in New England, the terms town and township were sometimes used as synonyms.

such officers to perform unless the sheriff was sued, or in case of his death, and by statute the ordinary duties of coroners devolved upon justices of the peace. Objection was made that the county treasurer was also made register of deeds. The union of the two offices would give too large an income, and, moreover, the duties of the two were entirely distinct. True, in the State of New York, in counties containing a population of two thousand inhabitants, the two offices were united, and the system worked well; but a clerk could be appointed to register deeds at less expense than would be entailed by giving the work to the county treasurer. The real objection was the union of two offices in one man—a union which Western democracy was little disposed to sanction. Possibly, in counties having a small population, such a combination might be made for a time, but the policy was to be condemned. The offices, in their nature, it was said, were incompatible, and it was decided not to combine them.

While the convention was in the midst of its work the death of President Taylor occurred. The announcement of his demise was accompanied by a brief eulogy on his character.* Michigan was not a Whig State. Her vote in the late election had been given to Lewis Cass, the Democratic candidate, one of her own citizens.† The majority of

* A leading Whig member, the Hon. H. T. Backus, of Detroit, later made a memorial address, "but the convention, as a convention, did not attend."

† The political sentiments of a majority of the members were fairly expressed on the 17th, when the compensation of members

the members of the convention had voted against Taylor. Political opposition sometimes pursues the memory of a public man even after death. The nation was now amid great dangers, and the convention fairly expressed the feeling of all people—that the President's death was a national calamity. The majority of the members had no sympathy with Whig politics, and slight sympathy with the now almost forgotten policy of the late President. As a testimony of its "deep and profound respect" for his memory, it unanimously agreed to wear the "usual insignia of mourning," and adjourned until the next day.

On the 20th the qualifications of the voter were again discussed, and the discussion perhaps more clearly revealed the working principles of American democracy with respect to the suffrage than any report that is to be found in any other convention during the decade now closing. The Demo-

of the Legislature was under discussion: "The object of this convention is reform; we were called here to reform men out of office, to reform down the salaries, and to reform money into the treasury, and this measure [the reduction of the per diem allowance from three dollars to two dollars] is calculated to promote these objects. It is a Democratic measure, and I am a Democrat; a progressive Democrat, not exactly a young Democrat, but of the young old Democracy, of the Barnburner-Hunker species. I am of the old Jeffersonian school, and I now stand upon the national platform with the Cass Democracy. * * * With the fear of God before us, and General Cass for our political leader, we shall take front rank in the States of our Union. I am in favor of this measure because it is just; it is a measure of reform due to our constituents, due to the laboring classes—the producers of our land; they expect it from us, and their expectations must not be disappointed. The Democratic doctrine is equal rights—the greatest good to the greatest number."

cratic party claimed to be the friend of the people. A member of that party and of the convention now briefly rehearsed the history of the franchise. Before the reforms undertaken by Thomas Jefferson were won, an alien, he said, had to undergo a probationary state of twenty-one years before he could become a citizen of the United States. What had caused the change since that time? "The Democratic party, the party of progress and of equal rights, believing that democracy was confined to no geographic lines, that no man was consulted as to the location of his birth, determined to get rid of these aristocratic features of our constitution, which smacked too much of the relics of monarchy, of Great Britain, whose yoke we had just thown off; accordingly they went to work in the various Democratic States, and passed laws in their Legislatures to get up conventions to amend their constitutions. New York, I think, took the lead, and although opposed by the Federalists and Whigs, was successful. State after State followed the lead, until most of the old thirteen States have revised and reformed their constitutions, and among other things struck out the odious property qualification." The effect of this liberal policy begun in the States was to be seen in the change in the laws of naturalization, the probationary state of the alien being reduced to five years. "During this period," he continued, "I have never heard a complaint, except from the opposition, and that was that the aliens, in nine cases in ten, were Democrats." Thus the Democratic party, in oppo-

sition to the Federalists and Whigs, had "chased them from point to point," and "whittled down" the time of residence.

It was now proposed to shorten the term of residence to two years. A majority of the people of the State demanded this. Had not the Democratic party done much for the nation and the world in the dissemination of equal rights and liberal principles, and had it not much more to do? The peninsula State was the banner State of Democracy. "This convention," said a member, "is a Democratic convention. On us, and us alone, rests the responsibility of making a Democratic constitution." In this matter the remnant of Whigs and Free-soilers on the floor had no responsibility, "except artfully and deceptively to defeat the measure." By extending the suffrage to foreigners, the best interests of the State would be advanced; thousands of immigrants would be induced to come to Michigan. Wisconsin had already opened her doors and extended to them the right of suffrage, and, in consequence, thousands were pouring in and developing the resources of that State and adding to its riches. Thousands were going round by the lakes, and every traveller upon the Central Railroad would say he was going to Wisconsin. If any remained in Michigan, their friends in Wisconsin would tell them that the rights withheld in Michigan were freely given them in Wisconsin, and at the first opportunity they would leave Michigan and take up their abode in the other State. There they

had greater privileges in voting and holding office. After six months' residence a man ought to have the privilege to vote, at least in the management of county affairs. If some counties were filled with foreigners, who would say that they ought to be governed by four or five native citizens, and have to submit to whatever taxes these might choose to propose? Privileges granted to aliens could not long be productive of disadvantages of a serious kind. The State of Michigan was made up largely of aliens, and they tended more to the improvement of the country than did the native Americans, who were usually of a trading, speculating class. Aliens cleared the wilderness and made permanent homes; a native might clear a portion, but as soon as he could command a good price for his farm he was ready to sell and begin elsewhere. What was more fair and just than that aliens should have the privilege of voting for those who were to impose taxes on them and govern them? All, whether American-born or not, should be equally entitled to the benefit of the laws and have equal rights in the election of law-makers.

This laudation of the Democratic party was not suffered to pass in silence. Were those who achieved the independence of the United States, it was asked, prepared to give universal suffrage, as Michigan might now do? They were prudent, conservative men; they consulted the condition of the people at the time; they saw how far they might go, and discriminated so wisely, at least,

that the government they had founded had been perpetuated. Because they required a property qualification was not proof of the necessity of its continuance. For them it might have been wise to limit the elective franchise to persons who, by the accumulation of property, had given evidence that they could not be deceived.* As the people became better acquainted with their civil institutions and more qualified to perform the duties of electors, the restriction could be removed, and this had gradually been done, until the country had almost reached equal suffrage. Meanwhile our civil institutions had been retained unimpaired. Was not this still the proper course? Foreigners were mixed with the native-born in Michigan; they would soon become acquainted with the institutions of the State, enter into the feelings of its people, and be qualified to protect themselves in the discharge of their various duties, and then the elective franchise would be safe in their hands. But where large foreign colonies existed in the State was this expedient? Settling in great foreign communities, the American citizen had no access to them. They were under the control of their religious protectors to a far greater degree than was commonly supposed, and, being cut off from American influence, they could not, in a short time, become acquainted with its institutions. Was it right to give the franchise to these foreigners, who had no knowledge of its mean-

* An argument for property qualifications advanced in the Virginia convention of 1829–30.

ing, until years had passed and circumstances had qualified them for its exercise? Many of these foreigners had been asked whether they wished a new constitution to give the privilege to all foreigners to vote, and three-fourths of the replies had been in the negative. Was it true that the restriction of the right of suffrage caused most of the immigrants to pass through the State? On the contrary, did not Michigan have the most flourishing colonies of Germans and Hollanders to be found anywhere in the West? Their passing to Wisconsin was to be explained on entirely different ground. It was to the interest of the shipping and forwarding business to carry them as far as possible. If they were left in Michigan a large part of the profit of the carrying-trade would be lost. If they came by the lakes, the lake interest wished to carry them the circuit of the lakes; if they came by the Central Railroad, the railroad interest wished to carry them through Michigan. The fact that Michigan had such an accession to her population from foreign countries, in spite of the efforts of the railroad and shipping interests, was evidence that the State might expect her full share of the foreign population without abusing her institutions by giving that population improper privileges. The policy of those who opposed the extension was well expressed by a member who said of the foreigner, "I want to Americanize him as speedily as practicable. I want to make the American system of education, American magistrates, and American associations

indispensable to him, because these are the only mediums through which you can extend to him the benefits of American institutions." On the other hand, the ideas of those who favored extension were briefly expressed by a member, who said: "It is becoming the settled policy of the new States to admit all residents, or nearly all, to the privileges of electors; and the whole people and the nation sanction it. Whichever State is most rigid and exclusive loses the best portion of the emigrants. * * * It is plain that the whole of the new States are rapidly approaching universal suffrage. Let universal suffrage and universal education go hand in hand, and all the interests of society are safe." Yet those who accepted the last idea applied it only to the white race.

The recent constitutions of the Northwest greatly influenced the convention. Illinois, Iowa, and Wisconsin had just refused to extend the suffrage to free persons of color. In Ohio and Indiana they were already excluded. It could hardly be expected that Michigan would be more liberal than the other States of the Northwest. Some of the members who were willing to give the free negro the right to vote were unwilling to declare him eligible to office. Racial antipathy was still too strong, even in an ardent Free-soiler, to make him willing to be governed by a black man. A German, a Frenchman, or even a native Indian, might be elected to office, but a negro—never. Perhaps psychologists will explain this antipathy by the law of association. If for ages

the African had been free, and the Indians or the English his slaves, racial antipathy would have become quite different from what it now is. As long, at least, as four millions of negroes were in bondage in this country, it was hardly to be expected that public sentiment, even in the most Northern States, would favor, much less demand, negro officials.

Democratic reform was the programme, and in carrying it out the convention abolished appointive offices and made all elective. It was not done without long discussion. The influence of New York was greater in the convention than that of any other State. New York had reduced its prison discipline to a complete system, and that part of the system which specially commended itself to the convention was its economy —the State prisons in New York being in a great degree self-supporting. It was now proposed to make the agent of the State prison an elective officer, chosen at the general election every two years. The Michigan State prison had cost the State annually about eleven thousand dollars. The problem before the convention was to reduce the cost and improve the efficiency of the institution. The first could be secured by reducing the number of officers and curtailing the salaries of officials; the last by letting the prison labor out to contract. These prison reforms, as they were called, did not, however, meet with approval.

On the 24th of July the article on finance and taxation was reported. It was in itself a summary of

experience in finance and taxation in the newer States during the preceding thirty years, and every provision was intended either to redress evils of long standing or to prevent new ones. In applying the specific taxes, those raised for the support of the university and the primary schools should first be paid; secondly, those for the current expenses of the State; and, lastly, those for paying the public debt. State expenses and the interest of the debt should be met by an annual tax. Beginning with the year 1851, the Legislature, by an additional tax, should provide a sinking-fund of at least twenty thousand dollars a year, with compound interest at six per cent., and an annual increase of at least five. This fund should be applied solely to the extinguishment of the principal of the State debt, which, when paid, the fund should cease to exist. The Legislature was not forbidden to borrow money to meet casual deficits, but the amount to be borrowed should not exceed a fixed sum. A general exception to the power of the Legislature to contract debts was to be made in case of invasion or insurrection. To individuals, associations, or corporations the credit of the State should never be loaned, nor should the State issue script or certificates of indebtedness except for the redemption of State stock already issued, or for the payment of authorized debts. It should never become a subscriber or in any way interested in the stock of a company, association, or corporation; or be a party in any work of internal improvements, or engaged in

any business except in the expenditure of grants or donations of land or other property made to the State. A uniform rule of taxation should prevail; assessments should be made upon property at its cash value; and a State board should be called into existence every fifth year, beginning with 1851, for the purpose of securing an equalization of assessments. Greater care should be observed in tax legislation. Every law should distinctly state the amount of the tax and its object; reference to any other law should not be sufficient.*

Widespread, irresponsible banking had taught the people of the United States many lessons. All the constitutions made from 1830 to 1850 record the efforts of the people of the States to obtain a system of sound banking. The policy now proposed was, in general, to submit all banking laws to the people for ratification. It was thought that a law made under this test would secure responsible banks. The question came up on the 25th, and the idea was immediately attacked as wrong in principle. An expression of public opinion of any value on a long article such as a bank law could never be obtained. A single principle to be ingrafted into a constitution might properly be submitted. Every act of the Legislature might as well be put through the same process. The people did not demand it, because they had no time properly to attend to the matter.

* Compare the provisions of the article with similar articles in State constitutions from 1800 to 1850, Chap. xiv.

The real question was whether, when an act had been rejected by popular vote, it should be lawful for the Legislature to submit another bank law until a certain time elapsed. The people might change their opinions before the period had passed, and therefore the restriction might prove inconvenient. To this it was replied that, as the sessions of the Legislature were to be limited to forty days, the members would not have time to be bored by the lobbyists. If a general banking law were passed by the Legislature and rejected by the people, it was for the best interest of the State that another should not be passed within a specified time. Otherwise the Legislature would be bored by lobbyists every session until another banking law was submitted. The people having decided the question, no other banking law could be passed until this specified period had elapsed, and the business of the State would not be interrupted. But some members objected to the entire scheme. Why submit a bank law to the people at all? Honorable men sent to the Legislature would be above solicitation, and the interests of the people would be safe in their hands.

The question, however, was part of a larger one: Ought the details of a banking system to be incorporated in a State constitution? It was now proposed to permit a system by which all the issues of notes and bills should be based upon stocks of the United States or of the State. This, it was said, would make the system absolutely safe. Why encumber the plan with useless provisions

and specious details? These would only impede the influx of foreign capital into the State. Some of the members went so far as to ask that the system be submitted to the people as a separate amendment. Others, that every bank charter, with all its provisions and details, should be treated in a similar way. But the general argument was a matter of experience with many of the members and with thousands of the citizens of the State. In 1838 "the people were scourged by the system of banking then established—the so-called wild-cat system, and by chartered banks that were but little better in their effect on the public interest."* As the people had suffered, and as they were the sovereign power, they wished to hold control over the subject. If it was necessary that a bank be established in a community, the people of the community were the best judges. They had lost more by banks than would pay the public debt. But the basis of the system now proposed was State stocks. These were to be the panacea for all ills. But had not the friends of banks always declared that, under whatever system was proposed, the people were to be protected? If the country should again be convulsed, as in 1837, who would pay the State stocks? There is no absolute safety, said a member, in banking institutions gotten up in this State or any other. Legislatures are not beyond the influence of men who want those institutions. Was a Legislature ever known to come

* See Vol. i., pp. 329–335.

together without deciding against banks by a heavy vote, and before the close of the session by chartering banks by a larger vote? The only security of the people would be to keep the matter wholly in their own control.

But, it was asked, would popular ratification make the issues of the bank secure? Were the mass of voters in the northern part of the State, where the foreigners were so numerous, capable of voting intelligibly on the bank question? Would it not be better to leave banking open and to establish a system securing bill-holders against loss, such as was already existing in New York, and thus make the security of the depositor and bill-holder independent of the action of bank officials? If Michigan was to have no banks, then the depreciated bills from Ohio, Wisconsin, and Canada would flood the State. But was it possible to establish a safe system of banking, and especially by a popular vote? In 1837 the people were as crazy as the Legislature, and would have voted for a bank, or a dozen of them, in every school district of the State. Would the State stock security system be any better? The national government and the State government, it was necessary to assume, were forever going to be in debt. Therefore the security of the system was to be a liability. The chief danger of the plan was the risk of political interference. In every State there would be found an active political party in favor of keeping the State in debt. If Michigan had fifty banks, with an aggregate capital of sev-

eral millions, based upon an amount of State stock deposited as security for that amount of circulation, every officer, stockholder, employé, and party who had an interest in these institutions, scattered over the State, would be leagued in an effort to keep the State in debt. To these were to be added all persons engaged in the business of banking, who would combine to produce still more extended indebtedness, by means of which to furnish a basis for operations; and the member who advanced these ideas concluded by declaring that all systems of banking were but modifications of the gigantic schemes of swindling disclosed in the South Sea Bubble, in John Law's Mississippi banking scheme, and in the old bank of the United States. But it was urged that the personal liability of the stockholder would be ample security. Would the personal liability of a penniless man be any use to the creditor or bill-holder? Would not this very provision prevent men of real capital who had money to loan from becoming stockholders? The direct tendency of the whole system would be to confine the business of banking to that class of men in Michigan and elsewhere who had generally been engaged in it; men who were borrowers rather than lenders; men who were adventurers, without capital, seeking "to live by their wits at the expense of honest men." But the question involved not only the direct sanction of banks by the people, but whether there should be no banking permitted in the State. Many believed that as other States had a bank currency

it was equally desirable for Michigan. "A large portion of our currency," said a member, "consists of bank-paper introduced from other States and the Canadas. If that could be avoided, if you could erect around our State a Chinese wall against this foreign currency, and have for our circulating medium nothing but coin, I should be disposed to favor the proposition. I believe you would have an ample currency; that the precious metals now existing in the commercial world, and the quantities now so rapidly produced by the mines of California and other countries, would furnish an ample supply."

The question of supply, however, was entirely different from the question of authority. Should the people, or their agents, the Legislature, exercise this? As the question was further discussed, the members repeated the old arguments heard in Congress when it was proposed to recharter the United States Bank; and the House practically divided, not on the line of argument, but on the line of party membership. Probably no question before the convention involved a matter more serious in the experience of its members. The suspension of specie payments, said one, did not begin with Michigan. All the States with which Michigan had commerce—especially New York, Ohio, Indiana, and Illinois—had suspended, and Michigan could not sustain her currency alone. When her people had asked their Legislature to grant the banks of Michigan the right to suspend specie payments, these had more than a million

and a half in circulation which would certainly have been brought home for redemption in specie, and much of it by the brokers of those States which had refused to pay specie. Being unable to obtain specie to redeem their circulation, the banks of Michigan were obliged to suspend. The great error of this suspension law, it was said, was in extending its privileges to the "wild-cat" banks. The privilege entitled them to suspend as long as their circulation did not exceed one and a half times the amount of specie actually contained in their vaults. Had these banks been in a condition to entitle them to the privilege they would have been perfectly secure. By the law, a free bank with fifteen thousand dollars capital could put twenty-two thousand five hundred dollars into circulation. In theory, to secure this circulation, the bank was to have fifteen thousand dollars in specie, endorsed notes worth the amount of circulation, and real-estate securities, assessed at half their value, to the amount of fifty thousand dollars—giving the bill-holders eighty-seven thousand five hundred dollars security for the redemption of twenty-two thousand five hundred. If the bank decreased its specie, it was required to reduce its circulation or lose the privilege of suspension. Bill-holders became alarmed, and designing and interested bankers joined in the cries of "Wild-cat!" and "Red-dog!" and the free banks had to suffer.

The free banks were always at a disadvantage. Individual capital could not compete for business with corporations established under the laws

of the State. The free banks were made to suffer at the hands of designing politicians until, at last, deceived, the people had accused these banks of being the cause of all their misfortunes. "The protective system," said a member, "is opposed by the people, but it is advocated by the high-tariff party on the ground that other nations have protective laws. But there is no reason that because other nations have protective tariffs, we should; or that we should establish banks because other States have suffered and are suffering from them." Therefore the question whether the State should have banks or not should be submitted to the people. All the States with which Michigan had business relations, it was said, had established banks, and were using a paper currency which their own institutions furnished, especially the States of New York, Ohio, and Indiana, and to these Canada was to be added. As long as these States used a paper currency it would be impossible for Michigan to use specie. Was it true that if the bank-paper of other States could be excluded from Michigan, specie would come in and take its place? Was it possible among thirty States, all using a paper currency, to select one and secure for it a specie currency, while commerce continued between that State and the others? As long as bank-paper was used specie would not become a general currency. The law fixing a penalty for the circulation in Michigan of the bills of other States of a less denomination than five dollars had been a dead-letter from the time of its enactment.

So was the law prohibiting the circulation of bank-bills from Canada. Every man knew that these laws were broken daily. Did not the constitution of Illinois provide that no bank should be established in the State except a State bank? Was not a bank established under the Territorial government of Illinois at Shawneetown, and later organized as a State bank, with branches in full operation? Did not a crisis come, crushing these banks, depreciating the value of their bills, and driving them out of circulation, and had not the people of Illinois decided that they would have no banks? Had they a specie currency? On the contrary, had they not the worst possible paper currency? and was not paper money issued by the million there by private persons without authority of law? Yet this large amount was kept in circulation in a State in which they had decided they would have no banks? Travellers through the State of Illinois, collectors of money, commonly reported that no other State had so bad a currency; that the depreciated money of the country found its way there, and even then was scarce; that exchange in Chicago or New York was five per cent. in depreciated script. Familiar sights in the streets of Chicago were signs of "Money to loan," "Money to loan on deposit of goods." One would think money was plentiful in the city. If an advance on good paper was asked at one of these offices the borrower would be told that the rates were five to seven per cent. a month if the paper suited, and that the paper wanted was

a pocket judgment note. This the money-lender always had with him, printed in blank. If this pocket judgment could be obtained against a man unquestionably good, so that the lender could get execution immediately if the loan was not paid, money could be borrowed for about seventy per cent. a year.

This state of things also existed in Wisconsin, another commonwealth which would have no banks. There, also, was to be found paper money, and little of it. In incorporating the bank at Ann Arbor, the Legislature, in 1849, provided that the stockholders should deposit in the treasury of the State United States stock to the amount of the bills they were allowed to issue. The deposit of fifty thousand dollars cost, it was said, sixty-five thousand. While such a bank might not be of much benefit to the county of Washtenaw, yet the bills of the bank, being redeemable in the city of New York at three-fourths of one per cent., were better than any other paper currency in the State. It was very convenient for those living in the vicinity of the bank to buy New York drafts. Until the bank was organized it was necessary to go to Detroit or to a broker to get such drafts. If other counties would establish such banks the people of the State would be safe from the depreciated currency sure to find its way into a State that had no banks.

If banks were to be permitted, should they be established under a general law, or should each bank charter be submitted to a popular vote?

Those who favored the first method pointed out that as most bank charters were drafted by interested parties, the guards necessary to protect the public were either imperfect or omitted, and the public might not know it. If every charter was to be submitted to popular vote, the State would soon be filled with banking institutions of almost endless variety and possessing conflicting privileges. The public would have to pay all the inevitable losses arising from such a heterogeneous mass of competing corporations. In spite, however, of the prospect of these evils, it was decided to submit every bank act to popular vote. Having provided for banks, it remained to make them as safe as possible. New York had set the precedent of registration and the required deposit of State or United States stock as security. This statement was incorrect. Bank charters in New York were granted only according to general laws; the Legislature was forbidden to permit the suspension of specie payments; all bills or notes put in circulation as money were registered as security for their redemption in money; and stockholders issuing bank-notes or paper circulating as money after January 1, 1850, were made individually responsible, for the amount of their issues and for all liabilities after that time; in case of the insolvency of the bank, the bill-holders were made preferred creditors.* An additional security would be a limitation of the period of the

* See New York constitution of 1846, Art. viii.

charter, say to thirty years. Bank charters should not be made perpetual. Such a charter, said a member, "strikes at the foundation of State rights and State sovereignty—a multiplication of corporations and the State no control over them!" For the safety of the public it was decided that no corporation, except for municipal purposes, or for the construction of railroads, plank roads, or canals, should be created for a longer time than thirty years.

The zeal of the Western States to promote internal improvements had greatly impaired their credit. By 1840 they were so heavily in debt that there seemed no escape but repudiation.* The panic of 1837 awoke the people to the necessity of limiting the powers of the Legislature and of incorporated towns to create indebtedness. To limit indebtedness, it was now proposed to restrict the powers of organized cities and incorporated villages to contract debts and loan their credit. It was also proposed to check another evil, of which there was at this time much complaint, by exempting territory annexed to a city from taxation for the payment of the existing city debt. The opposition to the latter provision was merely to its inclusion in the constitution. It might with greater propriety be left to the Legislature. It might not prove to be correct as a general rule. An escape from the difficulty was suggested—annexation should not be made without the consent

* See Vol i., Chap. xi.

of the inhabitants to be affected by it. But this restriction was opposed. Persons dwelling in the suburbs of large cities enjoyed all the benefits but were not required to share any of the expenses of the city. Another added that city improvements might be so great that the annexation of a suburb would increase the value of property in it so as to more than offset the burden of additional taxation. The subject presented so many practical difficulties that it was decided to leave it wholly to the Legislature.

The Kentucky convention of the preceding autumn had discussed at great length the relative merits of the independent supreme-court and circuit-court systems.* The same question arose now in Michigan. Should the supreme court be composed of the circuit-court judges, or should it consist of four men whose functions should be similar to those of the New York court of appeals? In support of the circuit-court system, it was said that it kept the judges in touch with the business of the State and prevented them from becoming rusty, so that they were less liable to make mere doctrinaire decisions. The circuit-court system was opposed on the ground of the expense, the multiplicity of judges, and the standing tendency to make the number of circuits and the choice of judges a political issue, and thus convert the judiciary into a part of the spoils of office. In support of an independent supreme court it was said that

* See Chap. ii.

only by such an institution could the highest judicial services be obtained. In proof of this the decisions of the New York court were cited as ranking with those made by any court in the world. If judicial ability was to be secured to the State by training judges on the circuit, it would be found that education of this kind was usually begun too late in life. A supreme court independent of the circuit court would be likely to draw its members from that court, and thus judges most distinguished for honor, discrimination, and knowledge in the circuit courts would be elevated to the supreme court, and the State would obtain the services of legal minds of the highest order. The judicial systems of the various commonwealths were not uniform. Generally speaking, the older States had thus far declined adopting the independent supreme-court system and had continued the circuit-court system* handed down from colonial times. The newer States—Indiana, Illinois, Iowa, Kentucky, Tennessee, Arkansas, and Texas—it was said, had rejected the circuit-court for the independent-court system; yet it must be admitted that the judicial systems in the new States were but experiments, while those of the older States had the sanction of many years to recommend them. "Who looks for legal authorities from the reports of Kentucky, Tennessee, Mississippi, Arkansas, or Texas, if he can find the authorities he wants in the reports of Massa-

* That is, the old English *nisi prius* system.

chusetts, Vermont, Connecticut, and New York, or in the English reports?" Thus the experience of the East and of the South was against the independent supreme-court system. California was mentioned as worthy of example in establishing a judicial system, but was it safe to follow a State which had not yet made a judicial report? After much discussion the result was a compromise. For six years the judges of the circuit courts should be judges of the supreme court, and four of them should constitute a quorum; after that time the Legislature might provide by law for the organization of a supreme court, consisting of one chief justice and three associate justices, to be elected by the electors of the State. This court when once organized ought not to be changed or discontinued by the Legislature for eight years. Thus the conclusion of the matter was left to the Legislature.

In 1846 Michigan had abolished capital punishment. It was proposed now, on the 3d of August, to make the substance of the law a constitutional provision. Those who supported the idea claimed that since the abolition of capital punishment crime had not increased in the State. Only four convicts guilty of the crime of murder were in the State prison, and of these only one knew before he committed the crime that the death penalty had been abolished. The four years' experience of the State had attracted the attention of the people of the Union. The precedent which Michigan had set was likely to be followed elsewhere.

New Hampshire had rejected it, though, it was said, only by a single vote. The principle itself had ample popular support. To this it was replied that the death penalty as the punishment for murder was fixed by the Almighty, and that it was, therefore, not necessary to have it abolished by the constitution. Though the statute abolished it in Michigan, the law had not been sufficiently tried to prove its utility. That only one of the convicts judged guilty of murder in the State prison knew that the death penalty had been abolished was only proof that ignorance of the law prevailed among the people. If the law was fully understood, crime would increase, for the principle of the law encouraged murder. A discussion followed on the interpretation that ought to be made of the judicial law, one member maintaining that the death penalty had the support of biblical authority. To this another member replied, that the support attempted to be derived from scripture authority had been carried beyond its legitimate bearings. The sentiment of the convention was against including the provisions in the constitution, thus leaving it to legislative action, though this conclusion was reached only by a majority of nine votes.* On the 15th of August the constitution was completed and the convention adjourned.

The plan of government now submitted to the people of the State contained provisions indica-

* Thirty-seven to twenty-eight.

tive of those phases of the evolution through which American democracy was passing. This plan provided for the election of Senators and Representatives by single districts. A State census should be taken every ten years, beginning with the year 1854, and the Legislature at its first session, and also at the first after a federal census, should arrange the Senate districts and reapportion the State according to the number of white inhabitants and persons of Indian descent not members of any tribe. Bills might originate in either House. The compensation of members was made three dollars a day for actual attendance and when absent on account of sickness; but only for the first sixty days of the session of the year 1851 and for the first forty days of every subsequent session. When convened in extra session the compensation should be three dollars for the first twenty days, and nothing more. Each member was entitled to one copy of the laws, journals, and documents of the Legislature of which he was a member, but should not receive, at the expense of the State, books, newspapers, or other perquisites of office not expressly authorized by the constitution. Limits were put on the power of the Legislature. Divorces could not be granted, nor lotteries permitted, nor lottery-tickets sold. During the last three days of a session, without the unanimous consent of the House in which a bill originated, no new bill could be introduced. No law could embrace more than one object, which must be distinctly expressed in its title. Nor could any

bill take effect until ninety days after the close of the session in which it was passed, unless ordered otherwise by a two-thirds vote of both Houses. The Legislature could not establish a State paper, but every newspaper in the State that published all the laws of every session, within forty days of their passage, should receive not more than fifteen dollars for services. Trial by a jury of less number than twelve might be authorized by law. The Governor was given the veto and the pardoning power without condition. But no provision was made empowering him to make appointment to office. Henceforth State officers should be elected. The exclusion of persons of color from the basis of representation and from the electorate conflicted with the separate amendment submitted to the electors for extending the franchise to them. The conflict fairly showed, however, the divided sentiment of the people of the State.

As one of the members had said, the convention was called to reform salaries, and the constitution fixed the annual salary of the Governor, State treasurer, the auditor-general, and the superintendent of public instruction at one thousand dollars; that of the judges of the circuit court at fifteen hundred dollars; that of the secretary of state, commissioner of the land office, and attorney-general at eight hundred. Additional fees and perquisites were forbidden, and the Legislature was declared incompetent to increase salaries. The articles on county and township government made it more efficient than formerly,

by constituting the counties self-governing and independent communities with a system of responsible public officials. This result is directly traceable to New England influence, which, wherever it has gone, has favored, and usually has established, the township system. The constitution of 1835 contained a brief article on education. The new constitution elaborated the provisions of the old, embodied the best results of legislation during the last fifteen years, and established an ideal system of education. Every school district was to maintain a primary school for at least three months in the year, and the article practically provided for a gradation of schools from primary to the university. It was made mandatory upon the Legislature to establish at least one library in each township, and provision was made for its support. The articles on finance, taxation, and corporations embodied the recent experience of the newer Northern States, and were intended to reform the evils of the time. The struggle between individualism and corporations which had begun many years before had now reached a stage of formulation in a State constitution. Individualism took a characteristic form in the article on exemptions; but its provisions were opposed on the grounds of public policy, as conflicting with the obligation of contracts. The northern peninsula was recognized as a geographical and political unit in the State, and its interests were provided for in a separate article. On the 5th of November the constitution was submitted to the voters

at a general election, and was adopted by a majority of nearly four to one.* The electors refused to extend the franchise to persons of color.†

* Total vote, 45,627; for the constitution, 36,169; against the constitution, 9433, and 25 blank votes. See the official statement by counties, in the Debates, after p. xliii.

† For extending the franchise to persons of color, 12,840; against it, 32,026. From the official record, Lansing.

CHAPTER X

DEMOCRACY IN A WESTERN STATE: 1850—CALIFORNIA

At this time the country from Texas to the Pacific was vaguely known to the East as California. Though the name was more strictly applicable to the region between the sea-coast and the Sierra Nevada Mountains, and from the forty-second parallel to the unsettled Mexican boundary, yet it was supposed by many to include also the country now known as Nevada, Utah, Colorado, and New Mexico.* There were yet no definite boundaries to California on the east and on the south. The excitement of the Mexican war had not subsided before the country, and indeed the whole civilized world, were thrown even into a greater commotion by the report of the discovery of gold in the new region. It was made at a time when the world may be said to have been in search of employment. The revolutions in Europe, and the close of the Mexican war in our own land, had greatly disturbed many industries.

* The authority for this chapter is the Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849. J. Ross Brown. 479 pp.; appendix, xlvi pp.; 8vo.

The veterans of the Mexican war returning home to the employments of peace were met by an invading army of European immigrants in search of labor. The discovery of gold gave opportunity for an easy and speedy acquisition of wealth, relieved the pressure of population in the older States, and also, quite as suddenly, shifted the scene of political agitation from the East to the West.

The social and political problems which had so long vexed the people of the Eastern States, slightly modified in form, were now to reappear on the Pacific coast; but the political renaissance was amid new conditions and new ideas, chiefly of an industrial character. The political ideas so long characteristic of the American people were to be revised under the necessities of free labor. So far away seemed California, Congress had ignored its political existence. It was accessible only by a long and wearisome voyage, consuming nearly one-third of a year by way of the Cape, or, if somewhat shortened, by an equally wearisome and even more dangerous journey across the Isthmus. If the immigrant would attempt to reach the land of golden promise by the overland route, he must cross the great American desert, as the intervening region was then commonly called, risking his life amid hostile savages and under a changing climate of which most startling and discouraging reports were in circulation.

In spite, however, of distance and difficulty, by the middle of the year 1849 nearly two hundred

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thousand men from various States and countries had arrived in California; and early in that year the more thoughtful, law-abiding, and resolute among them had petitioned Congress to organize California as a Territory and to admit it as a State. The request, we know, was practically ignored. The statesmen who favored either its Territorial organization or its admission were in the minority. Its people, at the time of signing these petitions, were, in fact, the inhabitants of an organized American commonwealth; they were citizens of an unrecognized State. Never before was the American character put to a severer political test. The golden magnet had attracted both good and bad elements from all parts of the civilized world, nor were the evil influences in the inchoate State less active than the good. Never before had so varied a population collected in one place in the New World in so brief a time. The conduct of the better portion of the inhabitants illustrates the force of American political ideas when displayed in a new land amid new conditions. The persistency of American political ideas in California, almost immediately upon the arrival of its new inhabitants, led to the demand for a lawfully constituted government. Though the Argonauts of '49 came from the various States of the Union, they agreed in the essentials of good government, and especially in its organization in the traditional tripartite form.

It might be expected that the actual government which such men would organize would be

politically composite. Coming from thirty different commonwealths, equally divided as free-soil and as slave-holding, it might be expected that the people of California, when they united to form their constitution of government, would embody in it whatever portions of the constitutions and laws of older States in their opinion seemed best adapted to their condition. All this was done, and for this reason the convention which assembled at Monterey on the 1st of September, 1849, illustrates not only the course of American political ideas for the preceding three-quarters of a century, but also the potency of those political ideas which, in the opinion of so varied a body of delegates, were best fitted to survive. The time of doing this piece of constitutional work was at the close of an old era and at the beginning of a new one. Old questions were to appear with new meanings; the second half of the nineteenth century was to introduce the people of the United States to an industrial rather than to a political definition of their civil institutions. Not that this convention would determine the future of the Union merely by the formation of a free or a slave constitution, but the economic function which California would exercise in the evolution of American democracy would henceforth largely determine the national character.

A military government had existed in California since the conclusion of the Mexican war. Though Congress had failed to provide a civil government for the country, the President, through the Secre-

tary of War, had instructed Riley, the military Governor of California, to recommend to its people the calling of a convention for the purpose of organizing a State government. But the instruction of the Secretary of War to Riley was not addressed to him as military Governor, but as the executive of the existing civil government. No Territorial organization existed in the country, and the instructions of the Secretary were without precedent; but in the absence of a properly appointed civil Governor, Riley considered himself, by the laws of California, the *ex-officio* civil Governor of the country. The instructions from Washington were based on this theory: The government contended that the military government had ended with the war, and, having ended, the civil organization under the old Mexican laws was resumed, subject, however, to the control of Congress. Military and civil functions were thus lodged in the same individual. Riley considered them separate and distinct. The Secretary of War had instructed all military officers in the country "to recognize the existing civil government, and to aid its officers with the military forces under their control." All laws of California not inconsistent with the laws, the Constitution, and the treaties of the United States, were considered to be in force, and were to continue in force until changed by competent authority. To establish such competent authority was the purpose of the calling of the constitutional convention. California was in a political situation entirely different from that of Oregon. The former had been a part

of Mexico, and, therefore, possessed a working code of laws. Oregon, on the contrary, was an unorganized portion of the public domain, over which no laws had been extended.

"The situation of California," said Riley, in his proclamation of the 3d of June, 1849, "is almost identical with that of Louisiana (in 1803), and the decisions of the supreme court, in recognizing the validity of the laws which existed in that country previous to its annexation to the United States, were not inconsistent with the Constitution and laws of the United States or repealed by legislative enactments." It was necessary to take this position in order to make secure not only the property but the lives of the inhabitants. Congress having failed to organize a Territorial government, the existing wants of the country made it imperative to provide some civil organization; naturally the method for securing such an organization was by a constitutional convention. To this the qualified electors of the country might send delegates, who should make a State constitution, or adopt a Territorial organization, and submit their work to the people for ratification. The existing government at this time consisted of the Governor, appointed by the President, a Legislature, and the courts. By assumption of authority the military Governor was exercising the powers and functions of a civil executive. A Territorial Legislature enacted laws of a local character. There were the usual administrative officials, who, though differing in their titles from similar officers in the older

States, performed the usual administrative functions. The judiciary was of a Mexican cast, consisting of the fiscal and the four judges of the superior court.

The districts into which the country was nominally divided had each a prefect and subprefect charged with the execution of the laws and the preservation of public order. Their duties were like those of district marshals and sheriffs in the older States. In each district was a judge of first instance, an office by custom vested in the first alcalde* of the district. There were also subordinate judiciary tribunals, presided over by other alcaldes. In each district were also justices of the peace. The town councils, or ayuntamientos, performed duties like those of town or county commissioners in some of the older States. The principal administrative offices under Mexican law were filled by appointment. It was now proposed to reorganize the entire civil system and make it conform with that of an American commonwealth. General Riley, in his proclamation, named the polling-places at which the election should be held, and limited the right to vote to free male citizens of age, of the United States and of Upper California, who were actual residents in the districts in which they offered to vote. In Lower California all such citizens might vote, and those also who had been forced to come into the

* For an account of California at this time and of "Experiences as Alcalde," see *Personal Reminiscences of Early Days in California, with Other Sketches,* by Stephen J. Field, pp. 22 to 32.

Territory on account of having rendered assistance to the American troops during the Mexican war.

In order to avoid confusion in the election of delegates, the country was subdivided into nine districts, the boundaries of each being carefully laid down. The election was held on the 1st of August, and a few of the delegates chosen assembled on Saturday, the first day of the following September, in the town of Monterey, for the purpose of organizing the convention. No quorum appearing, the delegates adjourned until the following Monday, when the convention perfected its organization and began its work. On Wednesday, the 5th, Gwin, a native of Tennessee, but four months in California, and lately a resident of Louisiana—one of the controlling minds of the convention, and destined later to be chosen one of the first Senators from California—made a motion characteristic of the time and the country. There was no printing-press in Monterey. In the absence of this convenience, he had sought to facilitate the work of the convention by having printed elsewhere an edition of the constitution of Iowa, selected "because it was one of the latest authorities." He distributed copies among the members, that they might write on the margin any amendments which they saw fit to suggest.

Opinion was quite unanimous that any one of the later constitutions of the country might serve, not only as a model, but actually as a working basis, and, with slight modification, be adopted

by the convention. This apparently simple and speedy way for the adoption a State constitution proved, however, one of great difficulty. No one constitution of the thirty then in force, it was soon discovered, satisfied even a majority of the members. The amendments likely to be proposed to any one of them would be practically a new constitution. In the evolution of American government, it is these conventions that register the force of political notions of the American people dominating from time to time. There was no doubt that the fittest of those notions would survive, but the problem before the convention was to determine the fittest. On some settled questions there was little diversity of opinion. Thus, the committee on the plan of the constitution, reporting on the 7th the article of the declaration of rights, made no inclusion of antislavery clauses. The question of the suffrage in California was made difficult by the presence of various races of men. Those of its inhabitants who, under Mexican law, possessed the rights of citizenship, could not, with justice, be excluded from the exercise of those rights under a new constitution. A member of the new State must have all its rights and privileges; even the Indian could not, without due process of law, be deprived of the rights secured to the white man.

The first effort to define the rights and privileges of the citizen at once led to a discussion of the racial meaning of the word. A member of the State might be an Indian, a negro, or a

white man. But was there not another view of the question? Was it designed to include under the phrase "member of the State" either Indians or Africans, even if Africans were ever allowed to come into the country? Nothing was said of the introduction of slaves. Indians were inhabitants of the United States, but they were disfranchised.* It was not intended, in the use of the word "franchise," to grant the political franchise, but civil rights only. One member quoted from Webster's dictionary that the word "franchise" was of French origin, meaning "to make free." The same member, with a freedom of expression quite Oriental, also said that none of the thirty constitutions of the country, except that of New York, contained anything about the franchise; the committee's report on the subject had been taken word for word from that constitution.† The prejudices of an old population in California, however, compelled the convention to respect vested rights, whether political, civil, riparian, or agrarian. There was no increased effort to deny to that population rights claimed by new-comers. Some of this ancient population were of mixed blood. What political, what civil rights should be granted to them?

On the 10th, it was moved to forbid slavery, or involuntary servitude, in the State unless for the punishment of crime. No sooner was this proposition submitted than a member proposed to

* Excepting in the Wisconsin constitution of 1848, Art. iii., Secs. 1, 3, and 4.

† New York constitution of 1846, Art. ii.

amend by adding that the introduction of free negroes into the State, under indenture or otherwise, should not be allowed. The brief debate which followed resulted in the unanimous consent of the convention to submit the antislavery clause to the people, under a separate article, for ratification. As in Louisiana five years earlier, a varied population, speaking several languages, had made it necessary that the work of the convention be reported in English and French,* so in this convention of California, the debates being in English and Spanish were reported in these languages. The sentiment of the people of California at this time towards free persons of color was speedily shown. On the 11th it was proposed that the Legislature at its first session should pass laws effectually prohibiting them from immigrating to the State, and also to prevent the owners of slaves from bringing them into the State for the purpose of setting them free.†

It was said that some men had brought their negro slaves to the State to serve for a few years in the mines and then to set them free, and thus form a most undesirable social element in the community. If the people of California were to be free from the curse of slavery they should also be free from the hordes of slaves who might be set at liberty within the State. In Illinois the clause affecting the immigration of free persons of color and of slave-owners with their slaves had

* See Vol. i., pp. 400, 461.

† See Vol. i., Chap. xii.

been laid before the people in a separate article, and had been approved by a majority of twenty thousand.* In 1849 had not the people of California greater reason to fear the introduction of free negroes than had the people of Illinois in 1848?

The slave-owner possessed of one hundred negroes could well afford to liberate them if they engaged to work for him three years in the mines. More than any other State in the Union, California needed protection from such a class. Negro labor in every form should be excluded. Clearly the Creator had made the negro to serve the white race. True philanthropy required the exclusion of the African from California. If there was any desire that all mankind should be free, the two extremes of civilization should not be brought together, as they would be if Africans, whether slave or free, were allowed to settle in the State. Its citizens should be protected in their honor and in their inestimable right—the right to labor. Was it not a holy commandment, that by the sweat of his brow man should earn his daily bread? The laboring-man was the true nobleman. He should not be degraded by being placed upon a level with the lowest in the family of men. The African might rise in the scale, but not in California. Its people were willing that he should have the boundless wastes of his native land as the field for his improvement—a region in which

* Illinois constitution of 1848, Art. xiv. See journal of the Illinois convention, Springfield, 1847, p. 452.

the All-wise Creator had seen fit to place him. Placed in California, instead of good coming to either party, evil would come to both. His exclusion was reasonable and just. Undeniably, a free black population was one of the greatest evils that could afflict society. The people of California should be protected against all monopolies; this could not be if the negro race were admitted. If admitted, capitalists would fill the country with these "living laboring-machines," and, enriching the few, impoverish the many. The vicious propensities of the negro population would be a heavy tax on the people. Officers would have to be multiplied, prisons increased. The prevention of so great an evil should not be left to the Legislature; it should be settled by the constitution itself.

If the constitution should come forth without a clause excluding free negroes, a black tide of population would spread over the land—a greater curse than the locusts of Egypt. Never before in the history of the race had a State promise of such a future. "The Golden era is before us in all its glittering splendor; here civilization may attain its highest altitude; science and literature will here find a fostering parent, and the Caucasian may attain his highest state of perfectability." But "to be able to pluck this golden fruit," every member of society should be on the level with the master, able to perform his appropriate duty. No one could doubt that the negro race was out of its social sphere, and, when among the Caucasians,

was a discordant element. "Look at our once happy republic, now a contentious, antagonistic, discordant people. The Northern people see, feel, and know that the black population is an evil in the land, and, although they have admitted them to many of the rights of citizenship, the admixture has acted in political economy as a foreign, poisonous substance, producing the same effect as in physical economy—derangement, disease, and, if not removed, death." The member who uttered these sentiments was a physician, born in Ohio, but lately a resident of the State of Louisiana. He had been a resident of California four months.

The effort to define the franchise for a population comprising not only various races, but also a various commixture of races, disclosed many difficulties. The committee on the elective franchise reported on the 12th, in favor of limiting it to white male citizens of the United States of age, who had resided in the State six months, and in the county twenty days. Immediately, various amendments were proposed. The elective franchise should extend to male citizens of Mexico who had voluntarily become citizens of the United States under the treaty of peace, ratified at Queretaro on the 30th of May, 1848.* The ninth article of that treaty specifically stated the political rights of citizens of the Mexican Republic, and preserved them when the country was incorporated as part of the United States. They were

* Treaties and Conventions, pp. 681–693.

to enjoy "all the rights of citizens of the United States according to the principles of the Constitution"; following the precedent in the treaty of Louisiana, they were to be protected in the free enjoyment of their liberty, their property, and their religion. The very act of incorporation with the Union, therefore, made the citizens of the Mexican Republic residing in California citizens of the United States. If the clauses proposed were adopted, the citizens of Mexico lately become citizens of the United States could not vote before they were declared citizens by act of Congress. The simplest procedure would be to declare all persons citizens of California who were citizens on the 1st of May, 1848.

One of the members, an attorney-at-law, a native of Virginia, of which State he had been a resident sixteen months before, hoped that the franchise would be granted only to white citizens. A Mexican member wished to know the true meaning of the word "white." Many citizens of California had by nature a very dark skin, yet there were those among them who had long been allowed to vote and also to fill the highest public offices. It would be unjust to deprive them of the franchise of citizens merely because nature had not made them white. If the word was intended to exclude the African race, it was correct and satisfactory. The Virginian answered that he had no objection to color, except so far as it indicated the inferior race. He wished to use a descriptive word which would exclude the African and the Indian. A member,

a printer, born in New York, from which State he had come two and a half years before, objected to the word "white," because it would produce great confusion in the administration of government. The treaty of 1848 declared that Mexican citizens of the United States should be entitled to the same rights and privileges as American citizens. It made no distinction on account of color, and, therefore, the convention had no right to make one. On this point the treaty was the supreme law.

It was asked whether, under Mexican law, Indians or negroes had ever voted. The Virginian acknowledged that they had voted, but henceforth they should be excluded from doing so. A Mexican member thought that Mexican law excluded no race from voting, and in reply to Gwin's question, whether Indians were considered Mexican citizens, said that some of the first men in the Mexican Republic had been of the Indian race. Gwin understood that there were twenty thousand Indians in Mexico, but were they allowed to vote? Foster, a member born in Missouri, replied that in Mexico few of the Indian race were admitted to the suffrage, but that they had been excluded from it, not because of color, but by property qualification or by occupation. By the constitution of the Republic of Mexico they were considered citizens.

Hastings, a lawyer, six years a resident of California, a native of Knox County, Ohio, evidently familiar with political methods, thought that if Ind-

ians were not entitled to vote by the Mexican law, they would not be entitled under the treaty, and the convention might exclude them. It would be a very injurious policy to allow Indians to vote. There were men among the wild Indians who were very popular, and who could march hundreds of them up to the polls, and as it was difficult to distinguish Indians from Indians, those from the mountains would be entitled to vote as well as those from the plains, and the people of the State would be somewhat at the mercy of savages. There was a strong disposition in the convention, however, to treat the Mexican inhabitants of the country justly.

At this point Tefft, four months in the country, a lawyer, and a native of New York, though recently come from Wisconsin, read the Mexican law. It limited the franchise to Mexicans having an income of one hundred dollars. The reference to the supremacy of the treaty of 1848 at once aroused State sovereignty ideas. The Virginia member declared that Congress had no power to define the franchise. The States of the Union were free and sovereign, and they alone could prescribe the right. No one need take the trouble to look at the treaty of peace for authority. It was competent for the people of California to declare that no man should vote unless he had black hair and black eyes. Even if the treaty had said that none but citizens of Mexico should vote, the Constitution prescribed that the people of the State should fix its own elective qualifications.

Indeed, the Constitution of the United States particularly guarded against the abuse of franchise powers by Congress.

Gwin here interrupted by reading a clause from the constitution of Texas, which State, he said, was somewhat similar to California in the character of its population. Every free male person of age, and who was a citizen of the United States, or who at the time of the adoption of the constitution of Texas by Congress was a resident of the Republic of Texas, had resided in the State one year, or in the district, county, city, or town six months, should be an elector, except Indians not taxed, Africans, and the descendants of Africans.* The descendants of Indians, he did not think, should be excluded, but the pure, uncivilized Indian should not be allowed to vote. He had learned from an officer of the army that there were one hundred tribes of Indians in California; that they were controlled by a few white persons, and that they would vote as they were directed. The portion of the population in the habit of voting, those having property qualifications, ought not to be prevented from voting. The difficulty could be avoided by providing in the constitution that Indians, but not their descendants, might vote. This idea met with approval, and the constitution of Texas at once became a precedent.

The authority of the doctrine of State sovereignty was not allowed to pass unchallenged.

* Texas constitution of 1845, Art. iii., Secs. 1 and 2.

Gilbert was willing enough that any one should defend State rights, but as he read the federal Constitution it provided that the Constitution and all laws and treaties made in pursuance of it were the supreme law of the land. The federal Constitution itself settled the powers of the convention. It could not go beyond the treaty of 1848 and disfranchise any man whom it admitted to be a citizen. Perhaps the rule of voting for Governor and for other State officers might be fixed by the convention, but it could not deprive of any rights persons who had become citizens of the United States under the treaty. There should be no invidious distinctions on account of color. Hastings continued in the same spirit, remarking that if the treaty was not recognized, it did not exist, and war with Mexico was continuing. The only authority protecting the convention was that of physical force. It was under the treaty that the convention had assembled; and by virtue of the treaty alone the people of California possessed its soil. If the principle of State rights was to be carried so far as to say that the people of California were wholly independent, and need not regard the treaties of the United States, why not go further and wholly ignore the Constitution of the United States? A violation of the treaty was a violation of the Constitution. Was it true that the convention had a right to declare that no man should vote unless he had black hair and black eyes? Was that not a principle of State rights which could not be maintained under the existing

circumstances? Must not every citizen of Mexico, admitted to citizenship by the treaty, be admitted to citizenship under the Constitution? Any other course would be a violation of the treaty. If the principle was well founded—that persons admitted to privileges by the treaty could be excluded from citizenship—might not the convention, with the same propriety, exclude every native Californian?

This the convention could not do, and would not dare to attempt. Every man who was a citizen under the treaty must be a citizen under the Constitution, unless he declared his intention of remaining a citizen of Mexico. The constitution of California must conform to the treaty, or it would be null and void.

The Virginia member thought these remarks rather novel. He had heard many federal doctrines, but none like this. Plainly all that had been said about there being neither Whigs nor Democrats in the convention was but a shallow device; a new party had arisen, one even more extreme than the Federalist—a party contending that there was a power in the executive of the United States to make a treaty contrary to the Constitution. The treaty of 1848 was binding because it did not contradict the Constitution of the United States nor prescribe who should be voters. If it had declared as citizens of the United States those who were citizens of Mexico, this would not signify that they would be voters in California. Grant that the Mexican Indians were citizens of the United States because they were

citizens of Mexico—this did not constitute them voters. Because a man was a citizen of the United States, he was not a voter. Gwin cited Virginia as a State in which thousands lived and died without ever having the privilege of voting. The Virginia property qualification excluded them.* California might exclude a similar class from voting, but exclusion was neither right nor expedient. If under a liberal system of voting Mexican citizens were allowed to become electors, the poll in California would be greatly increased over that existing under the Mexican government. Evidently those only should be made electors who were so defined by the convention.

Hastings inquired whether the treaty did not define these Mexican citizens as persons entitled to all the privileges of free citizens of the United States, a provision which Gilbert thought, according to the Constitution, admitted them to rights exercised by citizens in any State. Hoppe, a native of Virginia, but lately a resident of Missouri, at this point made a different construction of the case. A property qualification was not strictly a precedent for California. California had become a part of the Union by treaty. The members of the convention had taken a solemn oath that they would support the Constitution of the United States. The treaty gave every Mexican citizen the right of citizenship in the United States. A treaty was a part of the supreme law of the land.

* Virginia constitution of 1830, Art. iii., Sec. 14.

If Mexican citizens were denied the elective franchise, when the constitution which the convention had framed should be presented to Congress it would be rejected, because it would be in direct conflict with the treaty and with the Constitution.

Dimmick, a lawyer, a native of New York, three years a resident in California, had yet another view. The treaty provided that Mexican citizens should at a suitable time receive all the rights of citizens of the United States. But what were these rights? Was California to admit such citizens to rights superior to those which the members of the convention enjoyed? The State was under no obligation so to admit them. The right of suffrage was necessarily the right of a citizen. Each State, in its sovereign capacity, had the right to make its own electoral regulations. The right to vote was not possessed by all citizens; it was a special, not a general, right. So the convention was not compelled to make Indians citizens, nor to give them the elective franchise. Many citizens of the United States in California were not entitled to the elective franchise. There was no reason why civilized Indians, who held land and paid taxes, should not be entitled to citizenship and the elective franchise. A man should not be excluded simply because he had Indian blood in his veins. Some of the most honorable and distinguished families in Virginia were descended from the Indian race. It was necessary, however, in California, by the constitution to prevent the wild tribes from voting.

At this point in the debate, Gwin drew an analogy between Louisiana and California—between the treaty of 1803 and that of 1848. When Louisiana formed a State constitution in 1812, the right of suffrage was limited. If there was at that time a violation of the Constitution of the United States, it was acquiesced in by Congress. In the constitution of Louisiana of 1812, the franchise was limited to free white male citizens of the United States. Yet Louisiana had been purchased from France, and the treaty of cession had provided that all rights of the citizens of Louisiana should be granted under the treaty. As in California, there was in Louisiana a mixture of populations. Louisiana for a time had prescribed a property qualification.* The practical effect of this qualification had been that vast numbers of votes had been created by buying up the public domain and transferring it in smaller holdings to parties who paid the taxes on it and were thus made voters. The precedent of Louisiana proved that the California convention had power to prescribe such limitations on the suffrage as it might think fit.

Dent, a native of Missouri, thought that if the treaty of peace between Mexico and the United States prevented the convention from prescribing the qualifications of electors, a treaty on the same principle could prescribe electoral qualifications, and thus practically destroy the sovereignty of a State. California, exercising an undoubted con-

* Louisiana constitution of 1812, Art. ii., Secs. 4, 8, and 12; Art. iii., Sec. 4.

trol over the electoral franchise, applied for admission to the Union on the same footing, and on the same conditions with other States, as a sovereign and independent State. In the exercise of this right no law of the federal government could interfere without depriving the State of its sovereignty. It was impossible that at the time of the adoption of the treaty the qualification of California voters was contemplated, nor was it probable that the treaty meditated the destruction of the sovereignty of the State.

At this point a member, born in Kentucky, and four months previously a resident of Louisiana, remarked that the clause under discussion might be subject to two constructions—that the Mexican might become a citizen of the United States, or choose to remain a citizen of Mexico; inhabitants of this class, by the treaty, were to be admitted to all the rights of citizens of the United States if they chose, but they must first make application. No treaty could make citizens of a State; the Union was one not of men, but of States. A man might be a citizen of the United States and not be an elector. The State, not Congress, decided his electoral franchise. This relation between the sovereign State and the federal government explained the variations in the electoral franchise in the several commonwealths of the country. His argument, appealing to State pride, particularly coincided with the selfish interests of the convention, as it usually has done whenever a State constitution is in process of formation. That

many officials in the Mexican government were of Indian descent, that they held property, that it was taxed, and that they who owned no property were not incapacitated from becoming property-owners, influenced the convention to admit them as citizens far more than any argument for their admission on the abstract right of manhood suffrage. The capacity to assist in supporting the State, rather than an incapacity because of race or color, was the true method of determining who should be included in the electorate of the State.

Dent expressed sympathy for the Indians. As the original proprietors of the soil, they were entitled to some consideration. They had always been independent, and they therefore ought not to be dragged down to the level of the slaves. Certainly they ought not to be classed with Africans. The convention at last decided to include in the electorate only those who were taxed.

Sherwood, a lawyer from Washington County, New York, thought that if the convention could not debar from citizenship persons who had been previously citizens of the United States, it could not debar from the same privilege those who had been previously citizens of Mexico. No one would pretend that because a person had been a citizen of Mexico previous to the treaty he became a citizen by right of the treaty, with the privilege to vote irrespective of any qualifications which the State might prescribe. In forming a new State there was a clear right in the convention to determine the qualifications of voters, but there was no right

to deprive a man of the civil rights of citizenship. A State could not deprive an Indian or even a free negro of the right to hold property. The exclusion was of a political character; the State had a right to say who should vote and who should be elected. There was an objection to accepting Indians, Africans, and the descendants of Africans. Was it intended that no man having the least taint of Indian or negro blood should vote? Such a doctrine had never prevailed in the Eastern States. Was it not better to state plainly that the franchise was limited to white male citizens? This would not debar the Spaniard, the Frenchman, or the Italian. Though darker than the Anglo-Saxon, these were white men. The words "free white male citizen," as descriptive of the voter, were used in the greater number of the constitutions of the Union.* The persistent force of this exclusion of persons of color was thus bearing fruit. But it seemed unjust to exclude such persons, provided they were taxed persons.

Semple, a native of Kentucky, although lately a resident of Missouri, remembered distinctly the provisions embodied in the constitution of his State which excluded negroes, mulattoes, and Indians from the franchise.† Indians in Kentucky had always been considered free; they had never been enslaved, neither had they been allowed to vote. Why not adopt the same principle in California?

* See the qualifications of the elector, from 1800 to 1850, table, pp. 476–479.

† Missouri constitution of 1820, Art. iii., Sec. 10.

They ought not to be taxed and also be deprived of the rights enjoyed by others. The Declaration of Independence laid down the principle that taxation and representation should go together. If a capitation tax was levied on the Indian, he ought to be represented. Though the native Indian might be excluded, the convention had no power to exclude his descendants. Evidently the way out of the difficulty was to define the citizen as a white male—a description already sufficiently explained in the courts of the United States. But the decisions of the courts on this point, thought Gilbert, would not be sufficient. It was not wise to prescribe a qualification for a voter which would compel him to go to court in order that he might understand it.

A member from Massachusetts proposed to exclude Indians, Africans, and the descendants of Africans to the fourth generation.* Another member thought that if an Indian was more than half an Indian, he was still an Indian; but if he was more than half white, he was a white man. He agreed with his colleague from Massachusetts that, in most of the States, African blood mingled with four generations of white blood was considered to be white blood. By the casting vote of the chairman it was agreed to extend the right of citizenship to the male Mexicans of the State.

But it was necessary to fix a period of residence also. Should it be twelve months? A vast num-

* The provision of the North Carolina constitution, Amendment of 1835, Art. i., Sec. 3.

ber of persons came to California to dig for gold and remain only during the working season. If the annual election came on the 1st of November, persons who had been in the country but a few months previous to that date, and on the point of leaving, would be qualified voters. Was this just towards the permanent population? Certainly, political policy forbade that those who came merely for the purpose of digging gold, carrying it away, and spending their wealth elsewhere, who were not identified with the permanent interests of the State, should be debarred from voting. Twelve months was short enough time.

What changes in public opinion since the time when it was thought necessary that a man should have resided for twenty-one years in a community before he should be entitled to vote! The causes which had cut down this ancient period of residence, as we have seen, were both industrial and political.* By reason of the industrial causes, the means of becoming acquainted with the wants of the State had become so greatly improved that a few months' residence in a community in the middle of the nineteenth century enabled a man to know more about its wants than would have been possible after a residence of years at the time of the adoption of the national Constitution. The political causes were chiefly of the nature of party bids for voters, each party desiring to increase its poll as rapidly and as easily as possible. There-

* See p. 105, and note.

fore, immigration from Europe was encouraged in the North. Competing bids of political parties for supporters rapidly cut down the time required for an elector to gain a residence. Twelve months in California was practically equal to half a lifetime in an Eastern State at the beginning of the century. It was inevitable that the time for gaining a residence in California would be short in comparison with the time prescribed in the older States.

By a vote of twenty-six to ten, the elective franchise was granted to white male citizens of the United States, and to male citizens of Mexico who might choose to become citizens of the State under the terms of the treaty; but electors were to be of age, residents of the State six months, and of the county or district in which they claimed to vote thirty days. An attempt was made to deny the rights of residence to persons living in the State who had left their families elsewhere, as this fact was considered sufficient evidence of their intention not to become permanent residents; but the proposition received scarcely more attention than one proposed by a member from Oneida County, New York, that all single men in the State should be required to marry within three months.

CHAPTER XI

CALIFORNIA AND THE UNION

On the 19th the committee of the whole proposed that the Legislature, at its first session, should pass laws effectually prohibiting free persons of color from coming into the State, and also preventing the owners of slaves from bringing them there for the purpose of setting them free. It was an echo of public sentiment in nearly all the free States at this time, and during the next ten years was to be frequently heard in State conventions. The member who proposed this legislation was a native of Kentucky, and had lately come to California from Oregon. California was in a peculiar situation, owing to its inducements to slave-holders to bring their slaves and afterwards enfranchise them. Against an evil so enormous as this the State had the right to protect itself. Free negroes comprised a population whose coming into the State would be most injurious to its prosperity, and most repugnant to the feelings of its people. They were idle, lawless, thriftless, and uneducated. Unless prohibited, they would soon come into the country in vast numbers. Their exclusion should, therefore, be ordained by the fundamental law. The precedent of Illinois was

feeble, if sought to be applied by California, because there were no gold-mines in Illinois. Every slave State sought to forbid the coming of free negroes. Thus excluded from the slave States, and from many of the free-soil States, free negroes would be compelled to seek refuge in California. Member after member arose to express the current of public sentiment in his district. The few free persons of color in the State were of no special disadvantage, but, unless excluded by the constitution, persons of this class would speedily arrive in great numbers. An able-bodied negro man in the Southern States was worth at hire from sixty to one hundred dollars a year. How many of them were actually paying interest on their absolute value? The net income from a male slave was very small. Suppose a slave were imported into California and there set free on condition that he should serve his master for a year. By the ordinary rates of accumulation he would produce from two to six thousand dollars in a year. His productiveness would, therefore, be incomparably greater than that of a slave anywhere else in the Union. If he produced only half of the ordinary amount, there were thousands of Southern slaveholders who would be glad to enfranchise their slaves and bring them to California. The terms of contract with them having expired, what would these slaves be other than a burden on the community? In a few years the whole country would be filled with the worst species of population, incapable of self-support, and comprising a pauper criminal class.

But the argument for exclusion was not allowed to pass without reply. An Irish member, who had recently immigrated from New York, took up the cause of the negro, an advocacy somewhat unusual with the Celt. He doubted that any slave-holder would bring his slaves to California merely for the purpose of setting them free. This he could do at home. Why transport them two or three thousand miles at great cost for the mere purpose of emancipation? Moreover, it was wholly unnecessary for the convention to adopt a resolution, because as soon as the slave touched the soil of California he was a freeman by the fundamental law of the land. That soil was free soil. Freemen of color had as good a right as white men to come to California.* To exclude them was to refuse to supply the wants of the State. California, like other States in the Union, needed them—especially in domestic service. As a mere matter of expediency it was unwise to exclude them. The Irish member's ideas of economy were at once assailed. The profits of mining, it was said, were sufficient to pay all the cost of transportation.

At the time that the people of California were making this constitution, the people of Kentucky were also in convention engaged in a similar work.† A member of the California convention, a native of Kentucky, said that he had heard that the pur-

* The question of the ability of a slave to contract was not raised. See constitutions of Ohio, 1802; Indiana, 1816; Illinois, 1819, 1848, on this point. These States denied him the right to contract.

† See Chaps. i–vi.

pose of the convention of Kentucky was to liberate the slaves of that State, and he knew that many of its citizens would be very glad to bring their slaves to California. At this point a member asked what were the provisions on the subject in most of the State constitutions. That of Illinois was cited as a specimen of the rest, and it prohibited free negroes. An Ohio member, who said that he had voted for the prohibition of slavery in California, thought it equally important that the African race should be excluded, and that on philanthropic grounds exclusion was better for that race. They were not indispensable to the domestic comfort and happiness of the people of the State, as his Irish colleague had intimated. Whether as freemen or as slaves, the blacks in America, it was generally admitted, were the greatest evil in the country. Had not Ohio tried the experiment of a free black population? Had not a great quantity of most excellent land been bought for them in that State, and put at their disposal?* Instead of tilling the soil given them, they had become thieves and paupers. Because this class would degrade labor, therefore should it be excluded.

A member from New York here arose and asked for consistency. The bill of rights proposed by the convention permitted foreigners to

* Referring to the free negro community in Brown County, Ohio, forty miles east of Cincinnati, on land given in 1820. "They want nothing but cowries to make them equal to the negroes of the Niger." See *Cincinnati Gazette*, during September, 1835.

exercise the same rights as land-owners, and to enjoy the same political privileges as the native-born citizens of the State. Now it was proposed to deny to a certain class of Americans, born within the United States, rights which were granted foreigners. Such a discrimination was unprincipled and inconsistent. What would the people of the United States say to the constitution of California if it asserted one thing in its bill of rights, extending the privileges of its free institutions to all classes, native and foreign, but excluded native-born Americans from participation in these rights? If the freeman of color was excluded from the State, then the article on human equality should be excluded from the bill of rights. Was it true that the State constitutions excluded free negroes? Some States had passed laws on the subject, but none excluded a negro population already in the State. There was a necessity for such prohibitory regulations in the Eastern States, as some of these were slave, others free. In the slave States citizens owning slaves were deprived of the right of emancipating them within the borders of the State. Many slave-holders, wishing to emancipate their slaves, but prevented from doing so by the law, had taken them into the free States, and had there emancipated them; thus the old and decrepit slaves were thrown upon the charity of free States. To exclude such a population was justifiable as a means of protection. But in California no such necessity existed. It was folly to think that slave-holders would remove

their slaves three thousand miles, at vast expense, for the purpose of enfranchising them; they could do it much cheaper at home. Nor would free negroes be brought into California under indentures, as no law permitting such relations existed in the Territory. If persons of color, under age, had been indentured and were brought into the State, undoubtedly the validity of the indenture would be recognized, and they would be required to serve to the end of their time, but on coming of age they would become free.* The danger of Californians being overrun with free negroes did not exist. California was free soil, and no man would bring slaves there to work in the mines when he knew that they would be free as soon as they entered the Territory. Was not California in a peculiar position? It would make the first constitution for an American commonwealth on the shore of the Pacific. All civilized nations would judge of the work of the convention. With what boast had Americans asserted that they had thrown off the shackles of despotic systems of government. Should it be said that the first great republican State on the borders of the Pacific had arrested the progress of human freedom? It would be time enough to provide against evils when these evils were really threatened. The Legislature at some future time might find justi-

* See Vol. i., Chap. xii., and notes. Also the discussion of "free negroes" in Vol. i., Chap. x. It will be noticed that the member from New York now repeated King's arguments advanced in 1820. See also Vol. i., p. 54.

fiable reasons for excluding persons of color. As yet the evidence of the necessity for State legislation was wanting; the organic law of the State should be consistent with the declarations in its bill of rights.

But the argument for the exclusion of persons of color was fortified by numerous references to provisions in the existing State constitutions. Should not these be a sufficient precedent to guide the people of California? In New York many men of color were respectable citizens. They possessed wealth, intelligence, and business capacity. Why should such as they be excluded? At least, if there was any doubt of the expediency of admitting persons of color, the provision should be submitted to the people of the State as a special clause. As the argument, curiously, moved along, opinions, supposed to be of an economic character, bearing on the degrading influence of the labor of black men upon the labor of white men, were stated again and again. If a black man and a white man were permitted to labor under the same conditions, it would be a degradation of white labor. This economic paradox fairly expressed the opinion of the majority of the people of the United States in 1850. California was a sovereign State. Those who had the right to come hither also had the right to stay at home. The social and political harmony of the State demanded that white labor should not be degraded. Tens of thousands of able, enterprising, and intelligent men were leaving their homes to come

to California. All these could not dig gold; many would be compelled to turn to other branches of industry. If white labor was not degraded, there would not be the slightest difficulty in obtaining white men to labor; but who would presume to estimate the difficulty if white men were to work with negroes? Were there not hundreds of men working in the placers who were in every way worthy to be members of the convention? These had been accustomed, in their old homes, to all the refinements of life. What new State in the Union ever had a population of so enterprising, so intelligent a character? Nor did these intelligent laborers consider it a degradation to engage in any industry which afforded an adequate remuneration. How long would this state of things continue if the white laborer was placed side by side with the negro? The white would be unable to compete with the bands of negroes who, set to work by capitalists, would monopolize labor. All the profits of the mines would go into the pockets of monopolists. Did not the Declaration of Independence declare that all men were free and entitled to certain inalienable rights? Some had inquired how the constitution could prohibit the negro race from immigrating to the State, and at the same time be consistent with the declaration? What consistency was there in declaring all men to be free, and in practically denying white men the privilege of laboring, save as they were subject to the demands of monopolies? This would degrade the white man to the condition of the slave.

Let no one imagine that slave-holders would not bring their slaves to California, nor that their slaves would not be willing to come. The prospect of great gain would affect slave-holder and slave alike. The one would gain riches; the other, freedom. It was the common opinion of all the members of the convention who were natives of slave States, that, of all classes of population, free negroes were the most ignorant, wretched, and depraved. A New York member, who had spent most of his life in Louisiana, thought that even if slavery was prohibited, persons of color coming into California would be slaves to all intents and purposes, because the African was born to be subservient to the Caucasian. Neither political nor industrial equality could exist between the two races. Some of the inconsistencies in his argument were not suffered to pass without remark. Another member from New York wondered how negroes, all their lives indolent, deficient in force of character, could suddenly become capable of reaching California. Certainly the negroes would not come of themselves. If any exclusion was necessary, it was the exclusion of their masters. The love of freedom had induced thousands of slaves to seek refuge in Canada, but California did not stand in the same geographical relation in which Canada stood to the slave-holding States. Fancy negroes undertaking to cross the inhospitable wastes between California and the States! Moreover, everything should be done by the convention to prevent the insertion of any clause in

the constitution which would provoke discussion and hostility in Congress. The new State constitution should go forth in a form so unobjectionable that the free-soil man as well as the slave-holder could look upon it with approbation.

A member from Maryland boasted at this point that his native State had had no little experience in this matter, and of all the States had the best right to speak on the subject of free negroes. Concerning them other States had talked; Maryland had acted. Amid most gloomy financial difficulties, while her people were staggering under a load of taxation, and every honest man in the State was exerting himself to shield it from the danger of repudiation, Maryland, for twenty years, had taxed her citizens thirty thousand dollars annually for the purpose of colonization. She had deeply and painfully felt the evils of emancipation. But colonization had not solved the difficulty. As a means of relief, it was like bailing the ocean with a ladle. Some members of the convention might not believe that slave-holders proposed to come to California with their slaves, and there emancipate them on condition of a term of service in the mines. Let none be deceived. He had letters in his possession, received by the last steamer from men prominent in the State of Maryland, asking his advice as to such a procedure, and stating their intention to come in the spring of 1850. To unite free and slave labor was impossible. It had been tried in Maryland. Better to exclude the negro than to admit him

and try to get rid of the dangerous and degrading population afterwards, when it might be almost impossible to move it. Indeed, the Legislature ought to pass laws not only preventing negroes and mulattoes from coming into the State, but also making null and void every indenture for their freedom on consideration of services to be rendered.

As the evils of a colored population were more vividly pictured, the members ventured further in expressing their opinions regarding their exclusion. The Legislature ought to prevent persons of color, whether free or slave, from coming into the State. The State had better keep three men unfriendly to its interests outside of its borders than one inside. The article under consideration was a copy of the clause in the constitution of Illinois. If the convention was unwilling to include it in the constitution, then let it follow the method pursued in Illinois and refer it to the people.*

* The Illinois constitutional convention of 1847, by a vote of eighty-seven to fifty-six, on August 23d, decided to submit to the electors a section, to be voted on separately, as follows: "The Legislature shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from immigrating to, and settling in, this State; and to effectually prevent the owners of slaves, or any other person, from the introduction of slaves into this State for the purpose of setting them free."—Journal of the convention, pp. 453, 532–535, 572. The article was adopted as Art. xiv. of the constitution, and continued in force until 1870. The article was almost identical with that in the Missouri constitution of 1820, which precipitated the debate on the admission of the State and led to the Missouri Compromise — viz.: "It shall be their duty (*i. e.*, the Legislature's), as soon as may be, to pass such laws as may be

Though by every steamer persons of color were arriving in the State, and were free by existing laws, and could not be driven out of the country, it was impossible to prevent the coming of others of their kind unless by the adoption of such an article. California ought to be made a place where free white men could live.

These are old arguments, and those who read

necessary to prevent free negroes and mulattoes from coming to, and settling in, this State under any pretext whatever," etc.—Missouri constitution of 1820, Art. iii., Sec. 26. Thus Illinois, in 1848, did precisely the thing, by constitutional enactment, that Missouri did in 1820, and was forced by "a public, solemn act" to declare null and void. It will be remembered that one of the Senators from Illinois, Jesse B. Thomas, was the author of that part of the Missouri Compromise excluding slavery from the Louisiana country north of 36° 30′, the State of Missouri excepted. (See Annals of the Sixteenth Congress, First Session, p. 427; also Vol. i., Chap. x.) But since 1820 hostility to free persons of color had greatly increased. The Illinois provision, separately voted on and approved in 1848, accorded with public opinion throughout the country. (See Vol. i., Chap. xii.) Had Missouri been asking for admission, in 1848, with a constitution excluding free persons of color, there is strong presumptive evidence that opposition to its admission would not have been made on that ground. This presumption is strengthened by the evidence of hostility to the free negro, not only in Louisiana (1845) and Kentucky (1849), but also in California (1849) and Michigan. The elimination of free male negroes from the electorate was as persistent in free States (excepting Maine, New Hampshire, Vermont, Massachusetts, and New York) as in slave States, down to March 30, 1870, when the Secretary of State announced the ratification of the Fifteenth Amendment to the Constitution of the United States. Thus with the admission of California, the thirty-third State, twenty-eight States excluded the free negro from the suffrage. The acts of the Missouri Legislature of 1843 and 1846 (see Vol. i., p. 301) excluding free negroes from the State were in harmony with the opinions then pervailing in five-sixths of the States of the Union.

them now wonder that it was necessary to repeat them in California in 1849. As we have gone from State to State, following the people of the Union in their constitution-making, it seems as if these sentiments were so firmly enthroned in the American mind as to be American instinct rather than American reason. We might expect to find in this convention some protest on constitutional grounds against the exclusion of persons of color. A member, from New York, at last presented the familiar objection to the adoption of the clause on the ground that it denied to the citizens of each State the privileges and immunities of citizens in the several States.* One of those immunities and privileges was the right of migration, and no law the convention could impose could deny that right.† At once the discussion turned on the political rights of free negroes throughout the Union. The member replied that in New York, and in most of the Northern States, they were State citizens. Though State citizenship was denied them in the Southern commonwealths, yet even there they were citizens according to the spirit and meaning of the national Constitution. A State Legislature could justly correct evils which threatened the State, but it could not pro-

* See the speeches on the suffrage in the New York constitutional convention of 1821: Report of the Debates and Proceedings, by L. H. Clarke—John Jay, pp. 99, 105, 180; Chancellor Kent, 141, 186; Nathan Sanford, 97; Daniel D. Tompkins, 121; Martin Van Buren, 142, 181; Rufus King, 139, 146.

† Pennsylvania constitution of 1776, bill of rights, Sec. xv.; Vermont, 1786, Chap. i., Sec. xxi.; also, 1793, Chap. i., Sec. xix.

ceed in an unconstitutional manner. Was it not unconstitutional to provided that a free negro or any other freeman should not enter California? Why not exclude vagrants, murderers, assassins, and thieves? Why admit transports, the refuse of the populations of Australia and New South Wales, of the Sandwich Islands, Chili, and Peru? If the purpose of the constitution was to protect the community from the evils of a bad population, why prohibit only these Africans who were natives of the United States? Were not most of the immigrants to California from these places as bad as any of the free negroes of the North or any of the worst slaves of the South? Discrimination was in conflict with the national Constitution, and certainly it was a discrimination to allow an escaped convict from Botany Bay to enter California, and yet refuse admission to an intelligent, industrious free negro, a citizen of the State of New York. Even if the people of California should sanction such a constitution, there was a revisory power in Washington which would reject it.

Another member, a native of New York, described the resolution as one directed against the negro, who was utterly helpless, instead of being aimed against the slave-holder, who was the real person to be excluded. It is noticeable that in this convention the members who urged the exclusion of persons of color were not from slave-holding States alone. Nearly all the Mexican members joined in the demand for exclusion. The few members who sought to secure civil and

political equality for the colored man were from New York and New England. At this time the population of California was about one hundred and seven thousand, of whom about three-fourths were Americans, one-sixth were foreigners, and the remainder Californians. The number of Indians and Africans is not known. The proposition to exclude persons of color, slave or free, was adopted, though subsequently modified.

As soon as it was sought to fix the boundaries of the State, that thorn in the political flesh so long tormenting the American people—State sovereignty—was again felt. By what power should the boundary be determined? Ohio, Michigan,* Iowa,† and Missouri had experienced great difficulty in settling their boundaries. Should the boundary of California be left to the discretion of Congress? There was much occasion for dispute in the convention over the boundaries of the State, for these were known to no man. Some of the members wished the State of California to be as extensive as the California country; ‡ others were willing to call the Rocky Mountains its eastern boundary; still others would be satisfied with the boundaries as we now know them. Was not the actual settlement of the boundaries a domestic question? What right or power had Congress to define the boundary of an independent, sovereign, American commonwealth? Might not Congress divide California and make two States on the

* Vol. i., p. 318 and note. † Vol. i., p. 343 and note.
‡ See map facing p. 288.

Pacific? Clearly it was the duty of the State to refuse, like Iowa, to come into the Union unless Congress would agree to the boundary which the State thought proper to adopt. Perhaps no theme discussed in the convention provoked a more eager or varied debate.

One view represented California and the United States as two high contracting parties, each sovereign, and trying to make a treaty of union. Under this view, California should prescribe a boundary which Congress would accept, but with the understanding that the boundary thus offered was tendered by a sovereign State. The mere fact that California had an extensive Territory would not benefit her. Delaware, the smallest State in the Union, was the most powerful. The representation allowed that State was relatively the most influential in the Union. If the State were seeking political power only, it ought to have a small area. It would be better if California were divided into three States; instead of having two votes, with one hundred and twenty thousand people, there would then be six Pacific votes in the Senate of the United States. It was, therefore, folly to enclose too great an area; if once adopted the boundaries could not be changed. But the California country was fifteen hundred miles broad. If the convention left the boundary question open, it would leave the slavery question in a similar position. If the boundaries of the State were to be left to Congress, it was probable that the State would not be admitted for years. Would it not be better to in-

clude the entire California country in the State, and thenceforth settle the question of slavery west of Texas, and indeed for the whole country? This would put Congress and the nation under obligations to California. If the whole territory were not included within the State, endless discussions over slavery and other matters would arise in Congress at the time when the State should seek admission. The effect could easily be foreseen. The South would insist that California had no right to present its claims to Congress for a State government extending over a country as large as all the existing Northern States. The South would never agree to such an extension of free soil. If California settled its own boundaries, Congress could not refuse to sanction the decision. The slavery question would prevent the admission of California with an area comprising its entire territory.

Some had objected to the inclusion of the Mormon settlements in Utah. So long as these settlements existed, California could not be admitted with them within its boundaries, because the Mormons were about to establish a government for themselves. Already they had applied to Congress to establish a Territorial government for Utah. If the requests of California for admission as a State and of Utah for Territorial organization should come up in Congress at the same time, there would be a conflict, because Utah and California laid claim to the same territory. The opponents of the admission of California would

thus have further opportunity to delay its admission. Though Congress might grant governments to both, the vast extent of California country would not be allowed to become the area of the new State. The question of slavery would be involved in the discussion, and, under the nominal difficulty of a mere boundary dispute, the admission of the State would be indefinitely delayed, because the South would never consent that so large an area should be forever free soil.

Gwin pointed out a difference between the case of California and that of Iowa. Most of the States had come into the Union after a Territorial organization, but this had been denied to California. Iowa formed a State constitution, defined its boundaries, and submitted its work to Congress. Though her boundary was rejected, Iowa did not defy Congress. She quietly waited until Congress thought proper to admit her. Congress required of Louisiana that her laws and records should be preserved in the English language, and a similar request would doubtless be made of California. The history of Territorial governments proved that Congress had assumed a power which could not be lightly surrendered when the people of a Territory sought admission into the Union.

At this point in the debate the question at issue was curiously confused with irrelevant matter. There were members of the convention who, in their desire to introduce slavery into California, were willing to make its territory so large that Congress would reject it. California had gone

through an anomalous experience. It had been neglected by Congress. The questions agitating the Union in 1849 would all be involved, relevantly or irrelevantly, in the question of admission. Perhaps California would be the means of dissolving the confederacy.

But the spirit of compromise that hovered over Washington in 1850 also seemed to hover over Monterey, and there were those in the convention who fancied that its function, if not its destiny, was to solve the fateful problems before the country. One process in the solution was to fix upon such a boundary as would not preclude the admission of the State, by practically making the whole country west of Texas free soil.

An existing cause of discontent was the long neglect of Congress to provide any government for the region. To the people of California this neglect had been a humiliating discrimination, and was considered by them as an argument as well as an excuse to proceed independently of the national government. This discrimination was the more keenly felt because Congress had made no appropriation for the expenses for the Monterey convention. Without public buildings, jails, roads, or bridges, with the price of building materials and labor excessively high, without a dollar in the public treasury, without the means for raising taxes, the people of California were not only in a neglected and anomalous, but also in a dangerous condition. Were they not justified in organizing a government for themselves which

should solve the problems so suddenly thrust upon them? The southern part of the Territory was already nearly ruined for want of laborers to cultivate the farms and to care for the herds of cattle. The ranches, prosperous only three years before, had been abandoned, because the laborers on them had sought their fortunes in the mines. Indeed, the discovery of gold had inflicted the most serious injury upon the southern part of the Territory, where in 1847 was concentrated the greater part of its wealth and population. Already reduced to poverty, the people of this region were unable to pay taxes; more than this, they were almost unable to protect themselves. In the northern part of the Territory the majority of the people possessed no real estate, their property being chiefly the gold they had dug out of the earth, and this could hardly be reached by taxation. Towns had sprung up in a night, but property in them would scarcely return any taxes. Even if taxes were levied, the expense of collecting them was too great for government to undertake, when laborers and mechanics could command from ten to twenty dollars a day for their services. Clerks and appraisers of revenue must be paid at the same rate, and no government could meet such expenses.

Obviously Congress had sadly neglected its duty. No people at the time of seeking admission to the Union were more worthy of federal aid than the people of California, and this aid had been persistently denied. The geographical, the

political, and the social conditions of the country, therefore, tended to intensify the spirit of independence in the convention, and this spirit displayed itself in some curious ways. Perhaps no illustration more naïvely shows the working of this spirit than the discussion of a proposed system of education for the State. The immense value of the lands and other resources of the country made an efficient system of education possible, but the extraordinary cost of public undertakings in California made it necessary to provide a large permanent educational fund. This, indeed, could not be too large. Why should the people of California send their sons to Europe in order to finish their education? Men capable of giving instruction could be obtained; and one member, whose ignorance of English university organization and traditions was as grotesque as his confidence in the power of money, declared, in an outburst of vanity that provoked no criticism: "The president of the University of Oxford can be brought over if he is offered a sufficient salary." The energetic confidence which the Californians expressed in their prospective money power was one of the signs of these times, a sign which has been visible, and indeed remains visible, in other parts of the country. One obstacle in the way of the evolution of human welfare in America is a debasing confidence in the power of mere wealth—disassociated from private and public morality.

The neglect of Congress to provide for Territorial government on the coast certainly afforded

the people of California an opportunity to display high moral courage in their political action. The political factions which were waging war upon one another at Washington seemed too busily intent upon their petty strategies to consider the continental interests of the country. Indeed, the administration at Washington seemed willing to secure all the advantages and run the risk of none of the calamities that might follow from the action of the people on the coast. General Riley's proclamation was not allowed to pass without careful scrutiny. Polk's Secretary of State, Buchanan, with dialectic skill, had diagnosed the condition of California in his characteristic way. If the people of California remained inactive politically after the conclusion of the war with Mexico, this, he thought, implied that they continued the government which they found in existence among them at the close of that war. Buchanan's genius for masterly inactivity was further to be displayed before he left public life, and this chapter of his political career reads like the concluding chapter ten years later. But the astute Secretary of State differed in his opinions from the equally astute Secretary of War, Marcy, whose construction of American democracy compelled him to establish some government in California of the American type, if for no other reason than to distinguish it from the Mexican. Meanwhile the communications from Washington to General Riley were best known to him and to the Secretaries at the capital. The trumpet tones of "Fifty-four forty or fight" seemed

to have died away, and when the struggle for existence as a commonwealth was to be fought out by the people of California, the administration gave no helping hand.

General Riley in his proclamation claimed to be a civil executive, not a military Governor. But what government existed in California that made him such an executive? He found no civil government there, and he brought none with him. The only existing government was military, and its military character had quite disappeared. The country was without government. Congress, as General Riley had told the people of California, alone possessed the power to legislate for California, and yet Congress refused to legislate. The Commandant assumed that civil government existed in California, and he claimed to be its civil Governor. Practically the people of California were left to take care of themselves, and this they were fully capable of doing. Some claimed that, by the law of nations, the Mexican laws continued in force until repealed either by Congress or by California itself. But was there not much innocence in such an interpretation of international law? The American people had sufficient authority for interpreting that law. Marshall had declared the usages of the world in such a case—that if a nation is not entirely subdued, the holding of conquered territory is a mere military occupation until a treaty of peace shall determine what government controls. The acquisition is confirmed by treaty, and the ceded territory be-

comes a part of the nation to which it is annexed, either by the terms prescribed by the treaty or upon terms prescribed by the new supreme power. In case of such a transfer of territory the relations of the inhabitants with one another undergo no change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The mere act which transfers the country transfers the allegiance of those who remain in it, and the law which may be denominated political is changed, although that which regulates the intercourse and general conduct of the inhabitants remains in force until altered by the new government.*

The leaders of opinion in California in 1849 did not think that Marshall's opinion supported Riley's pretensions, nor did they accept the view of Secretary Buchanan, that California was left without a government. What legal effect, therefore, could an act of Congress have on the constitution which the convention was forming? The answer to this question was not unanimous. Some of the convention held that Congress possessed no legal authority whatever over California, because it was an unorganized community, not referred to in the Constitution of the United States. In order to come within control of the national Constitution, it was necessary that California should organize politically as a State and be admitted into the

* American Insurance Company *vs.* Canter, 1 Peters, p. 511.

confederacy. The authority of the supreme court as to the relation between the people of a Territory and the national government might well be doubted. The court which had given a decision making a Territory wholly controllable by Congress, it would be remembered, was composed of a batch of judges appointed by the elder Adams at the close of his administration. After the Federal party had been exiled by the people, President Adams had made its doctrines secure in the stronghold of the judiciary by appointing Federalists to the supreme court, who, whatever their legal qualifications, believed in the doctrines and principles of that party. As jurists, it was true, they had no superiors in America. Marshall himself would rank with the great judges of the Old World. The mere legal opinions of Marshall were confirmed by the general assent of the legal world, but his political decisions—judgments which he handed down in the form of judicial decisions—had long ago been reversed by that appellate tribunal, the voice of the people. Was not the overthrow of the Federal party proof of this reversal, and was not this political reversal of the court by the people about to be followed by a judicial reversal by the members of the court itself?*

This reference to Marshall was a reminder of a similar opinion towards him held by Democratic members of the Louisiana convention of 1845.†

* For a similar thought in Louisiana, in 1845. see Vol. i., p. 422 *et seq.*

† See Vol. i., p. 463.

The citation from Marshall now led to an examination of the doctrine of Territorial governments laid down by the supreme court. Was not that doctrine itself a mark of difference between two great political parties? The old Federal party, called Whigs in 1849, advocates of governmental power by a liberal, loose, and strained construction of the Constitution, claimed for Congress large and more extensive powers than their Democratic opponents were willing to allow them. The citation from Marshall would lead one to believe that Congress had supreme, even despotic, control over the inhabitants of acquired territory—an assumption extraordinary and anti-republican. If applied in government, the ideas upon which it was founded would subvert the very liberties of the people. Such a doctrine could not be found in the language of the Constitution. Certainly it could not be read into the clause that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States"; and yet this was the only provision in the instrument in support of the doctrine. It was a doctrine contrary to the Declaration of Independence, and tended to disfranchise the people. In proof of this, let the facts be examined. The word "territory" in 1849 was used in two senses—first, as an area of landed property; and, secondly, as a political organization instituted for the people inhabiting this area. The second meaning, by a figure of speech, was derived from the first. To the mak-

ers of the Constitution the first meaning only was known, because the second definition had been created long after the adoption of the Constitution. "At that time there was no such thing as a Territory in the sense of a Territorial government; the word had no such meaning, and therefore it never could have been used in that sense." An old meaning had been changed, and new perquisites of government had been claimed under the change—namely, that the public lands were the territory of the United States; and the clause of the Constitution authorized Congress to dispose of and make all needful rules and regulations respecting such territory just as for other property of the Union.

But if the word "territory" was interpreted as it had been by the supreme court, the inhabitants of the Territory, and not the Territory itself, would be meant, and the Constitution would be made to read that Congress had full power to dispose and make all needful rules and regulations for the government of the inhabitants of a Territory of the United States. If Congress could govern the people of the Territory, it might unquestionably dispose of them as it did of other property of the United States, and as there was no limit to this power of disposal, Congress might constitutionally sell the people at so much a head whenever a purchaser could be found. It could deal at its pleasure with the people as it did with the territory, the forts, the arsenals, the ships, and other property under its control.

Another claim of the Federal party dangerous to the interests of the people was the extent to which it carried the treaty-making power of the United States. A treaty was binding only when made in pursuance of the spirit and purpose of the Constitution. If it controverted these conditions, it would be null and void. It was a monstrous doctrine, subversive of all the checks and balances established against the abuse of power, that Congress was bound to surrender to the President and Senate not only its conscience but its judgment, and simply register the decree of the executive and the Upper House. A treaty disfranchising any portion of the human race was bad in itself, and therefore void. In America it was an established political doctrine that the liberties of men are not the subject of traffic or treaty. The law of England denied to a man the right to barter away his liberty; the law of America forbade any government to sell or cede away the liberty of its subjects. This was not only the doctrine of the cession, but also of the conquest of new territory. Congress had no authority to do either the one or the other. Thus, Congress had not even authority to collect revenue in California, for the relation between California and Congress was the same as that between Great Britain and her colonies when these were taxed but were denied representation. The cause which led to the separation of the colonies from England might now lead to the independence of the people of the Pacific coast.

Among the members of the convention was the acting Secretary of State, H. W. Halleck, then a brevet-captain, and destined to great military fame. He thought that the convention had too much to do without its attempting to reconcile the decisions of the supreme court under Marshall with the opinions of President Polk's cabinet. If Marcy and Buchanan differed, let them reconcile their differences themselves. If Clayton and Crawford differed in opinion from Preston, let them also settle their differences. If General Riley had acted contrary to instructions, let him be made responsible. The question before the convention was more immediate and pressing. Should it set the wheels of government in motion as speedily as possible in California after the ratification of the constitution by its people, or should it wait until the constitution was ratified by Congress? Halleck was for putting the new government into operation at once, nor did he think that opposition to such procedure would be made either in California or in Washington.

But, now inquired a member, had the people of the Territory the right to establish a State government and put it in operation without the sanction of the general government? There was no doubt as to the power of the State in municipal legislation, but could a State claiming admission also assert sovereignty and independence of the national government? The first answer to his question was a quotation from Calhoun containing ideas already well known: "It is a familiar prin-

ciple in our political creed that a people in forming a State constitution have the unconditional right to form and adopt the government which they may think best calculated to secure their liberty, prosperity, and happiness; and in conformity thereto no other condition is imposed by the federal Constitution on a State in order to be admitted into this Union except that its constitution shall be republican, and that the imposition of any other constitution by Congress would not only be in violation of the Constitution, but in direct conflict with the principle on which our political system rests."

This quotation had immediate effect upon the next speaker. Our forefathers, he said, had the right to declare themselves independent and to establish thirteen States; therefore the people of California had the same right. Certainly, in the absence of any action by the general government, California had a right to establish a State government, and thus make laws for its own protection, since Congress had neglected to pass them. The right of the State thus to organize a civil government did not necessarily imply the independence and sovereignty of the State. If Congress should refuse to give protection to California, it would be time enough then for the State to declare itself independent. Municipal legislation was wholly under the control of a State.* The government of the United States and General Riley ought to

* For application of this principle, see Civil Rights Cases, 109 United States, p. 3.

know that the Representatives of California intended to organize a government under the constitution as soon as possible, because they had the right to do so; and that they would determine the time when this constitution should become the supreme law of the commonwealth, because the sovereign right to do so resided in them. Presumably, in case of any difference of opinion between the convention and General Riley, he would support the decisions of the supreme court already cited. The work of the convention might then prove superfluous. If the decision of the supreme court was to conclude the matter, the constitution could not be put into effect until Congress had given its approval. In spite of the decision of the court, in spite of Riley's proclamation, in spite of the proclamation of the President, the decision of the question of having a constitution rested with the people of California.

But it was impossible to disentangle California from the mass of discordant elements over which the nation was then rankling. Sectional questions were dividing the North and the South, and one of these questions was the power of Congress over a Territory. Therefore, in order to avoid the risk of defeat in Congress, it was expedient that the people of California should make no assertion of independent sovereignty. The question was not one of abstract principles, but of practical organization and administration of government. The sectional feelings of the country on slavery had divided Congress, and really caused all the

difficulties of the situation. New Mexico was about to establish a government, and this fact would give an excuse to one political party to delay the admission of California until that Territorial government was established. It was expedient to avoid all irritation of Congress and to be admitted to the Union as soon as possible. But this spirit of compromise was distasteful to some members. The constitution in process of formation did not claim that California was an absolute and independent sovereignty. Its people asked only to be permitted to exercise State functions. If Congress refused them admission into the confederacy, they might then exercise State sovereignty. Whatever functions had been ceded by the thirteen States to the general government the people of California were also willing to cede to it.* They sought admission exactly on the footing of the original States.

By a vote of twenty-three to seventeen it was decided that the government established by the constitution should go into operation as soon as practicable after its ratification by the people.

* See Vol. i., Chap. vi.

CHAPTER XII

THE DICTATES OF FREE LABOR

It is not strange that the members of this convention should have measured all kinds of service in the State by the dollar unit. The committee on finance had reported favorably that the president should receive twenty-five dollars a day; that the pay of the members should be sixteen dollars, and that the same amount should be paid for every twenty miles of travel. It was immediately proposed to reduce the amounts one-half, but this brought up a discussion concerning the value of a member's time. Even the allowance proposed would not indemnify him for his time and the sacrifice he was making in his business in order to attend the convention. While its members were discussing State sovereignty, education, and the exclusion of persons of color, their friends and neighbors were making their fortunes in the mines. The temptation to fix the daily wage at a high figure was, therefore, excusably great. Certainly each member ought to receive the daily wage of a mechanic, and perhaps no more could be asked, because many of the mechanics on the coast were men of culture, and from almost any community in which a group of Americans could

be found there might be discovered men fully capable of discussing the provisions of a State constitution. For the first time in the history of our country a convention was composed of men from all the older States. Not only were they from different regions of the country, but they were of all professions, occupations, and political parties, and represented, in the aggregate, the active capacity of the whole land.*

Service in the convention was in competition with labor in the mines, and this competition tended to shorten the session of the convention, to cut down debate, and to give a nervous brevity to the whole process of transforming an unorganized community into an American commonwealth. But though the session was brief, all questions before the country came up for discussion, and thus the records of the convention of '49 are an epitome of the political thought not only at the time when the convention was in session, but also an index to the political experience of the American people.

In each of our constitutional conventions there is usually some piece of work done which illustrates the culture, the thought, and the tendency of its

* In speaking of these times, Emerson says: "America at large exhibited such a confusion as California showed in 1849, when the cry of gold was first raised. All the distinctions of profession and habit ended at the mines. All the world took off their coats and worked in shirt-sleeves. Lawyers went and came with pick and wheelbarrow; doctors of medicine turned teamsters; stray clergymen kept the bar in saloons; professors of colleges sold cigars, mince-pies, matches, and so on."—"The Man of Letters" (1863).

day. The boast of a member of the convention, that it could import "the president of Oxford University," is no more a sign of the times than were the seal and coat-of-arms proposed for the new State. Some thought the seal a most happy design, but that the motto was rather unusual. Around the circle enclosing the seal were to be represented thirty-one States, being the number of States of which the Union would consist after the admission of California. In the foreground Minerva should be represented as springing full-grown from the brain of Jupiter. Minerva was chosen as a type of "the political birth of California without having gone through the probation of a Territory." The classical precedent was not strictly followed, however; for at the foot of the goddess should crouch "a grizzly bear feeding upon the clusters from the grape-vine, emblematic of the peculiar characteristics of the country." If not strictly in keeping with the habits of the animal, the design should be made somewhat harmonious by the inclusion of a miner working with his rocker and his bowl, "illustrating the golden wealth of the Sacramento." Upon this stream shipping should be displayed, "typical of commercial greatness." In the background should appear the "snowy cloud-peaks of the Sierra Nevada," and above them the exultant cry of Archimedes, "Eureka," supposed to be happily applicable "either to the principle involved in the admission of the State, or to the success of the miner at work." The zeal displayed in combining Greek mythology and Amer-

ican history in the proposed seal might have cited precedents not only in the seals of some older commonwealths, but even more grotesquely in the seal of the United States. Any of these seals would produce consternation in a college of heraldry. They show imperfect appreciation, however, of "a new order of the ages," and a pathetic striving to represent the difficulties attending the founding of new commonwealths. If any of these seals is examined, it will be found to represent the characteristics of the time in which it was made, and thus interpreting a phase of American democracy.

The franchise being again before the convention, it debated whether or not to admit Indians to the right to vote, provided they were taxed or possessed of real estate. A Mexican member attributed the degradation of this race in California to their long enslavement there. Capable naturally of receiving instruction and of bettering their condition, they had been forced into degradation. Some of them, however, had worked their way out of bondage, had become property-owners, and had exercised the privileges of freemen. These ought not to be disfranchised. For a short time the old notion of requiring a property qualification was favorably discussed. Would it not eliminate from the electors the most objectionable of an undesirable class? Would it not save the State from the vote of many Indians who, legally freemen, were without property, and would be led to the polls in droves by designing politicians?

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Halleck wished to include in the right of suffrage all Indians who were taxed as the owners of real estate. But there were delegates who persistently opposed the inclusion of any other than the white man in the list of electors, and others who distrusted the capacity of the Indian to vote independently. There were but two hundred Indians in the Territory who, by the laws of Mexico, were entitled to vote. Their influence in a population of about sixty thousand could be but slight. A proposition to prescribe a property qualification of five hundred dollars for this class did not reach the stage of debate, for by 1849 American democracy would not listen to it with patience. But Halleck's proposition was lost by only one vote.

On the 2d of October the report of the committee of the whole on the suffrage, that the Legislature should immediately pass laws effectually excluding from the State free persons of color, was again brought forward. A Vermont member, lately a resident of the State of New York, read a definition of "inhabitant" from Walker's dictionary, to prove that all free persons of color were citizens of the places in which they dwelt. If California should instruct its Legislature to exclude these persons, the constitution would be subject to the same fate as that which had overtaken Missouri in 1820, for the proposed clause was almost verbally copied from the objectionable clause in the Missouri constitution of 1819.* A member

* See Vol. i., Chap. x.

thought that the provision, already agreed upon, instructing the Legislature to pass laws forbidding the owners of slaves to bring them into the State for the purpose of setting them free, was unnecessary, because slavery was prohibited. Was there not greater danger that slave-owners would attempt to introduce slavery?

When in 1821 the State of New York admitted free persons of color, otherwise qualified, to the suffrage, it was only a matter of time when they must be admitted to exercise all political rights in every American commonwealth. Massachusetts, New Hampshire, and Vermont granted them these rights earlier than the State of New York, but it may be safely said that the influence of Massachusetts, New Hampshire, and Vermont, after 1821, was not so great throughout the United States as that of New York. The New England migration reached its western limit along the southern shores of the great lakes by the middle of the century. But the migration from New York, and later from Pennsylvania, Ohio, and Illinois, extended, with diverging power, north and south over the entire Northwest, and continues extending to this day. It has already been remarked how often, in constitutional conventions both in the North and in the South, subsequent to that of New York in 1821, the precedent of this convention in admitting free persons of color to the suffrage was quoted and discussed. If in one commonwealth these persons could vote, then, by that provision of the Constitution of the United States which asserts that "the

citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," these persons must be granted these "privileges and immunities" in every other State. The New York convention in 1821 was, therefore, a dominant emancipating agent in American democracy. The constitutional conventions of the eighteenth century, under the enthusiasm and the democratic confidence which followed the American Revolution, enfranchised the white man. The New York convention of 1821 enfranchised free persons of color. President Lincoln, the reconstruction conventions, and Congress in the fourteenth amendment of the Constitution, enfranchised the African slave. These are the three great steps in the process of political enfranchisement in American democracy. But each of these steps was taken practically by the States rather than by the United States, because the right to vote is a privilege granted by a commonwealth, not by the nation. The fourth step in the enfranchisement of a citizen may be the constitutional definition of his rights and privileges by the United States, and the necessary abolition of all commonwealth distinctions in the elective franchise. Until this step is taken political confusion will continue to obstruct political economy, and the American people will continue to suffer from all those evils whose root is the uncertainty and instability of the rights and privileges of the citizen of the United States.

But in 1849, in liberal-minded California, it

could not be expected that the African, whether bond or free, would be made welcome, much less be admitted, to the franchise. The chief object of life in California was the acquisition of wealth. A constitution of government was formed only to make protection of life and property possible. The fierce competition engendered by industrial necessities always abolishes slavery. Slavery was excluded from California not because of love or pity for the slave, but because slave labor if admitted there would enrich the master by a process of industrial discrimination. Those who wished to instruct the Legislature to pass laws immediately for the exclusion of persons of color, demanded their exclusion as a means of industrial protection. The liberal policy of New York in 1821 could not be ignored in the catalogue of authoritative precedents. This was well illustrated in the discussion on the morning of October 3d, when, the excluding clause being again brought up, a proviso was introduced that nothing in the new constitution should be construed to conflict with the provision of the Constitution of the United States which declared the equal rights, privileges, and immunities of the citizens of each State. Such a proviso would enable California to escape the objections in Congress which had been raised at the time of the admission of Missouri. Even if negroes were not citizens, and consequently not entitled to citizens' rights and privileges, it was not expedient to antagonize Congress. Undoubtedly the State had a right to protect itself

against such a population. Was there not a middle ground?

An Alabama member related how in that State a law had been passed a few years before, requiring that all free negroes not residents in the State for a period of time prescribed preceding the law should be given a certain time in which to leave the State; in the event of non-compliance they should be seized and sold as slaves. Such a procedure was to the interest of a slave-holding State. If Congress could prohibit a State from protecting itself against free negroes, the State would soon be overrun with them. Not even the free-soil States were willing to receive them. If once such a horde should pour into Massachusetts, the people of that State would be the first to cry out "Enough!" Why should California make itself the paradise of free blacks? If other commonwealths could exclude them, why not California? Better forever to keep out of the Union than to admit free negroes. The hostility to the negro was intensified by the opportunities for gaining wealth in California, which the free black, like other human beings, would be quick to discern. Even if New York had seen fit to invest free persons of color with citizenship, it did not follow that every other State was bound to acknowledge that they possessed the rights and privileges of citizens. Some maintained that because the fourth article of the federal Constitution declared the equal rights, privileges, and immunities of citizens in the several States, therefore free persons of color were included. On the contrary,

the national Constitution was never intended to bear such a construction. At the time when it was made, not one State in the Union granted the rights of citizenship to the African.* New York, Pennsylvania, and New Jersey were then slave States. Slaves were held in each of the thirteen colonies. The recognition of the rights of citizenship in persons of color would cause endless absurdities. Suppose Texas should admit negroes to the rights of citizenship, would not New York have the right to exclude them? Had Texas the right to declare what class of people New York should admit? All agreed that free negroes were bad in character. And yet many insisted that because the constitution of New York endowed such persons with the privileges of citizenship, and because the Constitution of the United States declared that the citizens of each State should enjoy the rights and privileges of citizens of the several States, therefore the constitution of New York should determine the rights of citizenship in California.

The article in the Constitution of the United States recognizing these equal rights was intended to acknowledge equality in all civil rights, but not to interfere with the political regulations of the several States. If this was not the true construction of the article, then every State in the Union had violated the Constitution. Iowa required a Senator to be of the age of twenty-one;

* See Vol. i., Chap. x.

New York, of the age of thirty. Virginia required the voter to possess a property qualification; Illinois did not. Could a citizen of any one of these States go into another and claim the rights which he possessed in his own? "Such a construction of the federal Constitution would destroy our entire system of State sovereignty." Missouri had been admitted on condition that the objectionable clause in the constitution would be stricken out.* The Legislature of that State passed an explanatory act. With this promise President Madison, by proclamation, admitted Missouri into the Union. But the people of the State of Missouri, in a later convention, had said nothing whatever upon this subject. They had not annulled the objectionable clause in their constitution. California ought not to run the risk of provoking opposition. It would be better to omit a clause which, with other causes of objection, might endanger the admission of the State.

A member from Pennsylvania, born in Philadelphia, the Northern city at that time containing the greatest number of free persons of color, took strong grounds against their admission into California. He represented the opinion of his native State, as expressed in the constitution of 1838. Premising that the negro and the white man could not associate in their labors, particularly in California, he considered the admission of free negroes a greater injury than the admission of slaves.

* See Vol. i., p. 300 *et seq.*

Neither was wanted in California. What further evidence was needed of the utter incapacity of the free negro to contribute to the general welfare of a community than the negro riots in Philadelphia at the time of the burning of Pennsylvania Hall?* It was easy enough for the Puritan amid his frosts and snows to talk about the union of the races and the granting of civil and political privileges to the blacks; but the people of the States in which this class was most numerous, and who had a greater experience with them, knew better than to propose such absurdities. Were not Jamaica and Santo Domingo themselves convincing proof of the evils of a large population of free negroes?

A Rhode Island member, who had recently come from New York, viewed the constitutional question involved in the discussion somewhat differently than did many of his colleagues. Some had supposed that the convention was denied the right to introduce into the constitution a clause excluding persons of color because contrary to the provision in the federal Constitution; but did such a conflict really exist? The object of the federal Constitution was to bind together thirteen colonies into one Union—to give them one interest, and to prevent war between the sovereign and independent States. The purpose of the clause in the national Constitution, declaring the equal rights of citizens of the States, was merely to keep peace among them. If the State of New York should

* In 1838; see Wilson's *Rise and Fall of the Slave Power in America*, Vol. i., pp. 294 to 298.

pass an act discriminating against the citizens of Virginia, it would be in violation of the federal compact between the States. It would be, in a degree, a declaration of war against the citizens of Virginia; but if the State of New York found it necessary, for the peace and comfort of its citizens, to exclude men of a certain race purely upon grounds of policy, without reference to the State from which they came, certainly she had the right to do so as a sovereign and independent State; nor by so doing would she violate the Constitution of the United States. Suppose that a sect, under the color of religion, should carry on licentious practices; clearly the State of New York had a right to exclude from her borders all members of that sect, no matter of what State they might be citizens. Such an exclusion would not be an act hostile to another State.*

But aside from the constitutional question involved and the obvious right of California to exclude all such persons, there was another, perhaps a greater, reason for their exclusion: the two races could not mix without degradation to the white race. Even if the convention thought otherwise on this point, was it not better to empower the Legislature to make provisions of this kind than to incorporate them in the constitution itself? The people would elect a Legislature from time to time, and thus the popular will could find ex-

* This idea was at the basis of the decision of the Supreme Court of the United States in the Mormon cases. See Mormon Church *vs.* United States, 136 United States Reports, p. 1.

pression.* If this concession to the will of the people were omitted from the constitution, would not the people of California reject it?

This proved a happy suggestion. Nor was it the first nor the last time when a constitutional convention sought to escape a difficulty by putting the burden of it upon a future Legislature. The convention would not attempt to settle the question of admitting or excluding persons of color. Let the Legislature take this responsibility. One member reminded his colleagues that they ought not to forget the precedents already set in New York and Pennsylvania. In these States the courts had defined the term "citizen." Better let the whole matter of citizenship rest with the Legislature. It was not indispensable to the constitution that the convention should insert a clause excluding persons of color. An avenue of escape having thus suddenly been opened up, the convention quickly entered it, rejecting by a heavy vote, each time it was proposed, the proposition to put into the constitution a clause requiring the Legislature to pass laws as soon as possible, effectually to exclude from the State free persons of color and slaves.† At last one member, somewhat exasperated, proposed as an amendment that the Legislature should do just as it pleased on the subject of free negroes. But the convention was not to be diverted from its course, and at last it

* Following the precedent of Missouri. See Vol. i., p. 301, and note.

† Taken from the Missouri constitution of 1819.

was unanimously agreed that the admission of Indians to the right of suffrage should be left to the two-thirds concurrent vote of the Legislature, at any time.

In reading the California constitution of 1849 no one will suspect that half the time of the convention was given to the discussion of the rights of free persons of color. Indeed, so sensitive did its members become to any reference to the negro question, that on the 8th a member who had very remotely referred to it was warned that if he made any further allusions to the subject he would be shut off by a motion for the previous question. It was impossible, however, not to refer to the question. It serenely appeared whenever any matter of importance was under discussion. So on this day, the question of boundary being under consideration, the whole status of slavery again suddenly became a new point of division. Those who wished the boundary of the new State to be coextensive with that of the California country were hoping to quiet all slavery agitation in the United States by adopting this boundary. But in adopting it they would provoke such an antagonism to free-soil extension as had shown itself at the time of the acquisition of Texas.* Texas would make several slave States—would not California make several free States? When Texas was annexed to the Union it was secretly understood that at least four new slave States were

* See Vol. i., pp. 337 to 340, and notes.

practically then admitted. The question of slavery had delayed the admission of California. Had not demagogues raised the question whether the treaty with Mexico prohibited slavery in California? In the North, the Free-soil party—comprising about two hundred thousand voters, proclaiming their devotion to the principles of the Wilmot proviso—demanded the exclusion of slavery from the California country, whether or not the people there wished it. Had not at least twenty thousand Whigs in the State of New York, who in previous political contests had reviled Martin Van Buren, been brought together with the Democratic party on this question of slavery, and voted with Van Buren because he led the Free-soil party?* In New York State alone his supporters had polled a hundred thousand votes. Only the military popularity of General Taylor had won him the electoral vote. Otherwise, with only Northern, Western, or Southern men in the field, would not the result have been unanimously in favor of a Northern man? It was of very little concern to California whether for a few years it possessed the barren regions between the Sierra Nevada and New Mexico, but it was of great importance to the perpetuity of the American nation that the people of California should settle the slavery question. Was it not the duty of the convention, therefore, to settle this question,

* In the Presidential election, November 7, 1848, Martin Van Buren and Charles Francis Adams, the Free-soil candidates, received 291,263 votes.

if, by extending the government of the State over the entire California country for a year or two, it could prevent a further discussion of the question in Congress, and avoid a permanent division between North and South? The boundaries of California, therefore, were inseparably connected with the boundaries of slavery. California, as Mexican soil, was free soil. Ought it to be permitted to become slave soil?

But there were members of the convention who were born in slave-holding States, who had slave-holding sympathies, and who secretly wished to introduce slavery into California. These were not silent. A Virginia member expressed their sentiments. There was a most violent party in the United States, who had waged war against the rights of the Southern people—rights involved in the domestic institution of slavery. Already this party was known by the happy title of Abolitionist, and was as much deprecated by the good men of the North as by all men of the South. Not only were these men opposed to slavery in the abstract, and a large majority of Southern people opposed it in that sense, but, in spite of the Constitution, they sought to thrust their opinions into Southern homes. It was this faction who, in Congress, contended that it did not belong to any people living in territory acquired by conquest to decide for themselves the local question of slavery. This power, they contended, rested with Congress, which might permit or exclude slavery at its pleasure. Against this faction in the North appeared an-

other faction, at the other extreme, in the South, led by Calhoun, who contended that it did not belong to the people of the territory to settle this question for themselves, but that Congress could not prohibit the people of the South from introducing their domestic institutions into territory acquired by the common blood and treasure of all the States of the Union. Between these two violent extremists appeared a mediate party, representing the wisdom of the people both North and South who were willing to agree to a compromise—that the people of a Territory should be allowed to settle the matter for themselves. In application of this spirit of compromise, it was supposed that California would immediately erect herself into a State and settle this question for herself. But this question was involved in the settlement of the boundary of the new State. In settling that boundary the people of California would antagonize either the Abolition faction or the Calhoun faction. If the people of California wished to be admitted as a State into the Union, they must depend upon the votes of the party of compromise. The boundary of the State, therefore, should be one which would win the support of the true friends not only of the people of California, but of the American Union itself.

No one can read the record of the people of California at this time without being convinced that they thought that its admission was of vital importance to what at that time they called "our whole confederacy." Truly did a Wisconsin mem-

ber exclaim that for fifty years no body of men had assembled under circumstances of greater responsibility not only to themselves, but to the whole country. Had not the United States Senate, in an official map, laid down the limits of the State of California? Its admission meant that the balance of power between free-soil and slave-soil interests was forever broken. Its admission implied the permanency or the speedy disruption of the Union. But there were those in the convention who thought that the mere fixing of the boundaries of the new State would not settle the grave public questions of the hour. California could not be admitted into the Union with the entire area of the old California country, neither could its admission settle the slavery question. The South would forever insist upon limiting the new State to the smallest possible extent of territory; the North would oppose the South, and, the old contentions continuing to rage, California would be left without a government.

The number of compromisers in the convention increased from day to day. A member from New Jersey fairly expressed the sentiment of this group. Being from one of the Middle States, he said he belonged neither to the canting Abolitionists of the North nor to the hot-headed slave-holders of the South. He came from middle ground, and could therefore claim the political doctrines of the party of compromise. The first desire of California was to become a State of the Union. Why antagonize the political extremists of the country?

Better reduce the boundaries of the State than start up discord in Congress over its admission. No party, either North or South, could claim that it had been wronged by California. The free people of California, having the right to establish a constitution of government, had abolished slavery, and had done so unanimously. To extend the boundary of the State over an unlimited territory, without consulting the inhabitants of that territory, was beyond the power of the convention. The moderate men of the South, admitting the right of the convention to settle the slavery question for California, would never admit its right to extend the government of the commonwealth over the entire California country. Therefore the settlement of the boundary was a question of policy alone. Natural boundaries should give place to boundaries dictated by good policy. There was also an economic argument, of peculiar interest to the people of the State, against too great a boundary. At least five-and-twenty thousand Mormons had settled near the Great Salt Lake, none of whom were represented in the convention. By the terms of the Governor's proclamation, the Mormons had not been included among the inhabitants to be represented. The people of the California country not represented in the convention constituted at least one-fourth of its population. If, therefore, the entire California country was to be included within the boundaries of the new State, the apportionment of representation which the convention had made must be changed.

But it was impracticable to include the Mormons in this population. Such an inclusion would involve a vast expense to the people of the new State. On a basis of twenty-five thousand inhabitants in the region about Great Salt Lake, they would be entitled to seven Representatives in the Senate and Assembly. The distance from Great Salt Lake to San Francisco was about nine hundred miles, and, at the rate of mileage agreed upon, the cost for transportation of the Great Salt Lake representation alone would aggregate nearly eleven thousand dollars.

Even by this time the Mormon settlements were in a more prosperous condition than those in California. They had better mills, had more productive farms, and were more prosperous, considering their numbers, than the people of the coast. It was foolish, moreover, to believe that the region between Great Salt Lake and the mountains was a barren waste. Well-informed travellers reported that this region was capable of supporting a large population, and therefore ultimately of becoming separate States. The Colorado River was navigable for three hundred and fifty miles; gold might be discovered in the various parts of the intervening region; mineral wealth might be found to abound there, and in a few years it might possess a larger population than California itself. It was, therefore, manifestly unwise to exclude the Mormons from the convention and to cut them off entirely from representation. It was not equitable certainly to declare in one part of the constitu-

tion that representation should be in proportion to population and in another part practically that one-fourth of the population of California should be excluded from representation. Those, therefore, who wished to include the entire California country within the boundary of the new State were guilty of pursuing an unrepublican course. If the whole of California was to be admitted as a State, the convention ought to be dissolved, the apportionment of representation in it be remodelled, and the inhabitants at Great Salt Lake be included.

Halleck was convinced that California could exercise a determining function in settling the slavery disputes in the country. The pillars of the Union had been shaken by the contest between "the blind enthusiasm and fevered excitement of the North" and "the heated fancy and irascible honor of the South." Every attempt at compromise had tended only to widen the breach. The States east of the Rocky Mountains could not settle the question; the contending parties had advanced too far to recede. The whole country looked to California to do for the Union what the Eastern States could not do. Would California fail to perform "the great and responsible part" allotted to her "in the drama of modern politics"? The position of California was unprecedented in history. Men of intelligence and enterprise from the old and from the new States, from the commercial cities of South America, from Europe, were rushing in large bodies to this land of promise.

"Every avenue of approach," said he, "is crowded to excess, every vessel that reaches our ports is full to overflowing. This new population will form a State of high public spirit, and no other portion of the globe will exercise a greater influence upon the civilization and commerce of the world. The people of California are about to penetrate the hitherto inaccessible portions of Asia, and 'carry with them not only the arts and sciences, but the refining and purifying influences of civilization and Christianity.'" They were about to "unlock the vast resources of the East, and by reversing the commerce of the world pour the riches of India into the metropolis of the new State." At the same time new avenues of communication would be opened between California and "the older portions of the confederacy," connecting all together "with new bonds of interest and union."

One reason for including the entire California country within the limits of the new State was the ignorance of the true location of its eastern line. Should it be the crest of the Snowy Mountains? Travellers who had recently visited and examined that portion of California reported that some of the most valuable mineral and agricultural lands in the Territory lay on the eastern slope of the Snowy Ranges; that gold was as abundant on that side of the mountains as in the valleys of the Sacramento and San Joaquin. Others contended that the middle of the great district between Great Salt Lake and the Sierra Nevada would form the most con-

venient boundary on the east, and that if that line were prolonged south until it met the Gila River, it would include within the limits of the State most of the valuable mineral lands. These travellers also reported indications of coal near the Rio Colorado, or between that river and the Gila, and that this coal formation would be excluded by the limited boundary proposed. Did not these reports show that as yet there was too great ignorance of the "true character of the country east of the Sierra Nevada to determine positively where the eastern boundary of the State should be drawn"? Therefore, the boundary of the State ought to be left to be decided by the Legislature, when authoritative information had been obtained.

Another reason for including the entire California country within the boundaries of the State was the need of giving a government to the people who had settled east of the Sierra Nevada. Embarrassed as Congress would be by slavery agitation, the people would not be organized under a Territorial government. If an attempt were made, the old question of constitutional power and exciting discussions on sectional and domestic institutions would again arise. California could give these people a government. Under the constitution of the State, that portion of the country could be organized into counties and judicial districts, and life and property there could be made secure. Thousands of people were crossing that territory in order to reach the gold-fields, and crimes of the

darkest dye were committed on the road. If that territory were excluded from the limits of the State there would be no lawful method of bringing these culprits to trial and punishment. The question of slavery should, therefore, be settled for all California, and its constitution should be extended over the whole territory until such time as Congress would be able to organize a separate government for any portion of the territory which California did not wish to include permanently within its own boundaries. That a portion of the people of the California country was not represented in the convention was no reason why the boundaries of the State should not include them. There were many precedents, in the older States, of new settlements not included within any organized district or county, and without a voice in State conventions or in legislative bodies. Had there been time for the delegates to come from the Great Salt Lake, no one would have refused them admission. Therefore, the mere fact that any district in the California country was not represented in the convention was not an insuperable objection to including that district within the boundaries of the State. The constitution would have no legal force until approved by the people, but when ratified by a majority of the voters it would be binding upon all. In this portion of his argument Halleck followed Hamilton's argument in *The Federalist* in favor of the new features of the federal Constitution, and also his argument in reply to the objection that the Philadelphia con-

vention had exceeded its powers — that if the people of the several States gave their approval to these new features and to this exercise of power, all objections would be answered.* If the people of the California country ratified the work of the Monterey convention, every objection would be fully met.

No one pretended to say that all the people of California were represented in the convention, for many immigrants had entered the country since the election on the 1st of August. If the people did not like the constitution, they could reject it. If they did not wish to be included in the State, they could ask for a separation. All that the people asked for was a government. Congress had refused to give them one. They were willing to ratify a constitution and to organize courts of justice in accordance with its provisions.

Nor was the inclusion of the Mormon settlements at Great Salt Lake an objection. Some asserted that these were a disgraceful and dangerous people, who would destroy the peace and delay the prosperity of the new State, and involve it in civil war. Halleck cited his own experience in California in evidence of the good character of these people. "If not molested or persecuted for their religious opinions," they would prove, he thought, a peaceable and law-abiding community. But even if they were dangerous and troublesome, they should not be excluded from the State if they were

* See *The Federalist,* No. xl.

and early association. All these delegates claimed to settle pending questions for the people of California and for no others; therefore, any proviso leaving uncertain the boundaries of the new State ought to be rejected. The convention ought to settle the boundary of the new commonwealth in a way such as would be approved by the people whom they represented. But this somewhat questionable analysis of the sentiments of the House seriously disturbed its equanimity. A New York member at once arose to deny the intimation that the delegates from free-soil States were in favor of the Wilmot proviso, by advocating the inclusion of the whole of the California country within the boundaries of the State. He claimed that such an advocacy of boundaries was not an advocacy of the proviso. Such advocacy for the greater boundaries was not for the purpose of provoking a discussion of the slavery question in the convention, but to prevent the introduction of that question as a firebrand at the time when the admission of California would come before Congress. The Northern members were for excluding slavery from California. With this sentiment the Southern members had unanimously agreed. It was to prevent opposition among Northern fanatics, and among Southerners hypersensitive on Southern rights, that the convention ought to fix the boundaries of the State itself. Certainly no Southern man who claimed the right of the State to establish its own institutions would object to the exclusion of slavery within the established limits of the State,

nor to the right of the State to fix its own boundaries. Calhoun could not object to such a settlement by the people of the new State. The South would be glad to have the slavery question settled without discussion, for it knew that it was weaker in numbers than the North. The feelings existing in the North could not be eradicated. The South admitted that slavery was an evil entailed upon it and difficult to abolish. Slavery was an institution existing among the people of the South, and each State should sustain its own institutions. Slavery should be abolished, "State by State, according to the supreme and sovereign power of the people."

In spite of every effort to suppress undue agitation over the slavery question in the convention, excitement grew day by day. The gathering was chiefly composed of antislavery men. Of these forty-eight members, two were from Northern Europe, eight from California, seventeen from slave, and twenty-one from free-soil States.* All the members from free-soil States, however, though voting against the admission of slavery into California, were not willing, as we have seen, to extend any political rights to free persons of color. In the matter of the extension of such rights, they sided with their brethren from the South. But their

* New York, 10; California, 8; Missouri, 7; Louisiana, 4; Maryland, 3; Massachusetts, New Jersey, Virginia, 2 each; Pennsylvania, Ohio, Indiana, Illinois, Wisconsin, Connecticut, Oregon Territory, Texas, Scotland, France, 1 each. Lawyers, 13; farmers, 11; mechanics, 7; engineers (United States Army or Navy), 2; navy, 1; laborer, 1.—Debates, *pp*. 478–9.

prejudices and their education were of a Northern cast. Determined from the day when the convention was called that slavery should be excluded from the new State, they were necessarily supporters of the principle of the Wilmot proviso. They voted for the exclusion of slavery, not as did the members from Southern States, because of the sovereign right of the State to admit or to exclude slavery, but because they believed that slavery was wrong. All the members opposed the admission of persons of color to the State on selfish economic grounds. It was easy for some of the Southern members to misconstrue the ideas of their Northern colleagues, and to interpret their opposition to the extension of slavery as belief in the doctrines of the Wilmot proviso. The Southern members were really entering on the ground of squatter sovereignty; the Northern members, in opposing the extension of slavery in the very country over which it was sought to extend the Wilmot proviso, opposed slavery not because of the doctrines of the proviso, but because they believed that slavery was impolitic and immoral, a source of permanent confusion, an evil in the country. The Northern members were frequently accused of supporting the Wilmot proviso. A Virginia member continued the accusation by maintaining that these members in refusing to allow the citizens of the Territory to forbid or to permit slavery were supporting that doctrine. He declared, "not as a representative of the North or of the South, but as a free and independent Californian," that

he would vote against that doctrine "mentally and physically." Were the people of California to go to New York, and not only ask for a constitution, but ask if they might permit or exclude slavery? The people of California were free and independent, with the right to form their own government. And yet many of the members had asserted that the convention must be ruled by the North, and form such a constitution as the North would accept.

The excitement reached its greatest height on the afternoon of the 9th, when the vote on the boundary question was taken. By a majority of seven the greater boundary was preferred. No sooner was the vote announced than members rose to their feet in great excitement, and amid much confusion, one member, declaring that the convention had done enough mischief, moved an adjournment *sine die;* another shouted his protest against the vote, exclaiming that the thirty-nine thousand immigrants coming across the Sierra Nevada would never sanction a constitution which included Mormons. There were cries of "Order!" "Question!" and then a confusion of motions. A resolution adopted on the preceding Saturday had made this Tuesday the day of final adjournment. Amid much tumult this resolution was rescinded.

On reassembling next morning, the discussion of the boundary was at once resumed. So long as its settlement was identified with the fate of slavery extension, every pro-slavery man in the convention opposed the larger boundary, every

antislavery man desired that the boundary of the new State should coincide with the entire California country. The course of events in the next few years proved the truth of the assertion now made by some of the members, that the fate of slavery in the United States was involved in the settlement of the boundaries of California. The old constitutional question of the relation between a commonwealth and the United States was not exhaustively discussed at this time; it seemed a well-settled political doctrine in 1849 that an American commonwealth was sovereign and independent in the regulation of its domestic institutions, but the settlement of the boundary of California could not be made without reckoning with the people of the whole country, for California had been acquired at the common expense of all the people of the land.

Gwin referred to this when he said that California and New Mexico had been bought by the government of the United States at an expense of fifteen million dollars, and therefore Congress was clearly entitled to determine the boundary of the State. If the convention should make too great a boundary, Congress might admit a portion of California, and organize the remainder as a Territorial government. The old compromise line of 36° 30′, if extended westward, would divide the California country into areas sufficient to form separate States. On the eastern side of the Sierra Nevada this line signified more than on the western. The region of the California country south

of this line was totally unfit for slave labor, "being a grazing and grape country, with a few rich valleys and extensive arid plains."

It seemed as if the people of California at this time were hedged about by many limitations not of their own making—restrictions which had been imposed upon them as a political heritage from the Eastern States. So long as the country west of the Mississippi was in a Territorial condition, with few inhabitants, such arbitrary lines as those of the Missouri Compromise could make but little difference in the practical operations of government; but as soon as portions of this vast country were filled with population, and especially when a population sufficient to constitute a State arrived almost simultaneously within a small area, as was the case in western California, all the evils resulting from old political compromises were intensified. The spirit of compromise was in the air, and the common preface made by each member when he arose to address the convention was that he had come to the convention "in a spirit of compromise and conciliation."

A Virginia member, declaring that to institute a government, either directly or indirectly, over the people without their consent was a violation of the very principle of republican government, remarked that he had in his pocket the debate on this subject between Calhoun and Webster.* Putting the two men together, he said, both were right.

* Calhoun's speech of March 4th; Webster's of March 7, 1850.

One had a part of the argument, and the other made out the remainder. According to Webster, the Constitution of the United States did not extend to the people of California. If this was true, then, according to Calhoun, there was no power in the Congress of the United States to legislate for California. Calhoun did not prove that Webster was wrong; he had simply demonstrated the impotency of Congress to legislate for California. The constitutional objection to the greater eastern boundary was the want of power in the convention to extend the constitution over the people in the eastern part of the California country without their consent. A member from Rhode Island, lately a citizen of New York, at this point set forth the relation of the people of the California country to the constitution in process of formation. The South had laid down the principle that the people of a State were the sole judges of its domestic institutions. The conflict over the Wilmot proviso had raged on this issue. The South would, therefore, accept whatever boundary California might choose to make. How would it be with the North? It might not be satisfied unless the entire California country was included within the boundary of the new State. But North and South would not join issue on the question of the boundary. Neither of the two great parties fought over this issue in Congress. If there was to be an issue, it would be between the North and the people of California themselves. The North would ask why the limits of

the State were not extended to the Rocky Mountains? California would reply that it had no right to extend a constitution over a people who had not been consulted in the making of it, and that the expense of administering a government over so great an area would be too great to be borne. With this very sufficient reply, the North would be satisfied. It would not be so unjust as to say that the new constitution should be rejected and the new State refused admission into the Union because it did not extend its jurisdiction over an unwilling people. Therefore, the Sierra Nevada should be adopted as the eastern boundary line, and the admission of the State would come before Congress as a question easy of solution. There could be no issue with the South; therefore it was only necessary to satisfy the North. Even if the North should express some dissatisfaction, it would not refuse to accept the new State when the final vote came to be taken. California would give the North two Senators from a non-slaveholding State; that addition would turn the scale in the Senate of the United States. It would give the North, for the future, the command of the whole slavery question. The existence of slavery in the vast desert east of the Sierra Nevada was merely an abstract question. A great portion of the territory south of 36° 30′, and east of the Sierra Nevada Mountains, was an uninhabitable desert. Even if it should ever become a densely populated country, the North could not object to the admission of California, and the consequent

strengthening of Northern political opinions. Nor would the South refuse assent to the constitution. The admission of California would not prevent the formation of other States south of the old compromise line. The utter impracticability of introducing slavery into the arid regions of the California country precluded the idea that the South would labor to extend slavery there. If that region was ever subdivided into Territories, these would be erected into free or slave States in accordance with the compromise agreed to between the two great parties—that the people of the State should decide for themselves whether or not they would have slavery. On this subject there was no division of opinion between the people of northern and southern California. If California was divided, and the southern part became a free State, there would be two free States instead of one. By insisting upon the division, the South would lose more than it would gain.

The other alternative was to include the whole of California, leaving the exact eastern boundary to be set later by Congress and by the Californian Legislature. But would not such a conclusion as this—if it could be called a conclusion—be like "throwing down the glove between the two great parties"? It would raise the question, not of the admission of the new State, but of slavery. Should slavery be excluded forever from the immense territory east of the Sierra Nevada, or only from the natural boundary of the State of California? To insist upon the greater boundary for the State,

therefore, was to leave the matter of the admission of California into the Union an open question, which there was slight hope of settling. The South would fight its battles again in Congress, and on the same ground on which it had fought them before. Though the speaker was a Northern man, he had lived in a slave State sufficiently long to witness the practical evils of slavery, and to learn that it was deemed a curse by the slave-holders themselves. He was able to understand how the "California question" would appear to Southern members in Congress. The South would say that the people of California had a perfect right to exclude slavery from their own domain, but that they had no right to forbid its introduction into that vast territory between Texas and the mountains, where already there was a population of nearly forty thousand who did not participate in the making of the constitution. The adoption of the definite boundary, with a reasonable extent of territory, would prevent any issue that would divide the North and South. Neither decision would precipitate a conflict in Congress. Neither the South nor the North would yield.

In vain did members cite the boundaries as laid down in the old Spanish maps; in vain did others cite the recollections of the oldest inhabitants. Neither the Spanish maps nor the memories of these earnest men could be made to agree with the actual topography of the country. There were several old Spanish maps, but these did not agree with one another. The only map which could be

safely followed was the official map drawn by John C. Fremont, and already printed by order of the Senate of the United States. Whatever boundaries might be demanded by members of the convention, Congress would follow Fremont's map. The boundary agreed upon and set forth in the constitution, with some change of language made later by the engrossing committee, was adopted on the 10th by a majority of two votes. The two remaining days of the convention were spent in making unimportant revisions in some portions of the constitution, and in attempting to secure for the State a monopoly of its gold interests to the exclusion of the rights and interests of the United States. The reason for seeking this monopoly was the need of revenue. Congress had refused to establish a mint on the coast, and a unit of measure was necessary in determining gold values.

Not only a mint was needed, but also an assay office. It was unsafe to leave the value of gold to be determined by a fluctuating market. One member declared that when he had left the United States two years before, gold was worth fifteen dollars and forty-five cents an ounce. In Panama it was worth nineteen dollars; in Lima, Peru, eighteen; and at Valparaiso, seventeen dollars and twenty-five cents. Something should be done to secure uniformity in values. If the mint was established, gold pieces would be of uniform standard and fineness, and opportunities for speculation and counterfeiting would be prevented. But

should the mines be left free to everybody? One member would throw them open to all; another, to the American population only. Europeans would merely extract wealth from the country that they might carry it back to their own. In order to prevent loss to the State by this action, a New York member proposed to ask Congress to give to the people of California, for a series of years, or for so long as it might seem expedient, all the revenue which might be derived from renting, leasing, or occupying the gold placers. If a miner was a citizen of the United States, he should pay a monthly fee of five dollars into the treasury of California for the privilege of mining. But this proposition was an old foe under a new guise. The land of California belonged to the people of the United States. It would not do to prescribe conditions for its use which would discriminate against Americans, whether native-born or naturalized. This was the last effort in the convention to establish in California any monopoly, whether of race, of territory, or of franchise.

On the 11th, Gwin reported a generous ordinance, making appropriations of public land for the support of a system of common schools and for a university. One section of land for every quarter township of the public lands should be appropriated for the support of public schools, and seventy-two sections for the use and support of a university. In addition to this there should be a grant of half a million acres of unappropriated lands, and five per cent. of the income to

be derived from the proceeds of all lands lying within the State sold under the authority of the United States. The educational provisions made at the time of the admission of Louisiana, Alabama, Mississippi, Illinois, Missouri, Florida, Arkansas, and Michigan were cited as precedents for like generous appropriations in California.

In their address to the people of California the delegates referred to their birth in different climes, to their coming from different States; how that, educated with predilections for peculiar institutions, laws, and customs, they had been imbued with local feelings. The boundary established for the State was thought to be expedient, according to great natural landmarks, such as would bring into union all that part of the population of the California country who were identified by common interests, wants, and dependence. No portion of the territory was included whose inhabitants were not legitimately represented in the convention. In resolving unanimously to exclude slavery from the State, the great principle had been maintained "that to the people of each State and Territory alone belongs the right to establish such municipal regulations and to decide such questions as affect their own peace, prosperity, and happiness." With evident pride, reference was made to the ample provision for the establishment of common schools, seminaries, and colleges. California became a State under peculiar circumstances, "with an unexampled increase of population, coming from every part of the world, speak-

ing various languages, and imbued with different feelings and prejudices." No form of government, no system of laws, could be expected to meet with immediate and unanimous assent. Many of the population were natives of Spain, or Californians who had voluntarily relinquished the rights of Mexicans to enjoy those of American citizens. Long accustomed to a different form of government, and to regard the rights of persons and property as interwoven with ancient usages and customs, they might not at once see the advantage of the proposed new government. "But," concluded the address, "while all Europe is agitated with convulsive efforts of nations battling for liberty," the people of California had established political institutions, and had organized a government which might become a model "for every people who would hold themselves free, sovereign, and independent." *

With the admission of California closes the account of the formulation of government in the four quarters of the Union at the close of the

* The constitution was ratified on the 13th of November, 1849; the vote was 12,061 for and 811 against it. Of these votes, 10,700 were cast by Americans; 1300 by native Californians. In their memorial to Congress, of March 12, 1850, the Senators and Representatives elect from the State declared that not one of those votes was that of a foreigner, but that from twelve hundred to fifteen hundred votes were blanks, in consequence of the failure of the printer to place the words "for the constitution" at the head of the ballots. "The truth is," declared the memorial, "that no political result in the history of any nation is more surely the honest expression of public opinion founded in reason, reflection, and deliberate judgment," than this ratification of their constitution by the people of California.

first half of the nineteenth century. The civil processes which these four commonwealths display at this time are doubtless analogous to those in other commonwealths whenever the constituency has changed the constitutional organization. The process is practically continuous in America; for constitutional reorganization is constantly demanded, and almost constantly going on. The continuity becomes evident as the commonwealths increase in number. If some details seem to be overexploited in the account, let us remember that obscure organs have important functions, and that our knowledge of the State consists in our familiarity with the details of its organization and its administration. Our country has passed rapidly into civil perspective, and the heterogeneity which at first sight appears to be its principal characteristic, passes into homogeneity as we become familiar with the processes in our civil evolution. There seems a strange waste of details in democracy, but the processes, which seem to be only incidents, are later discovered to be essential to the evolution of government.

It must have occurred to the mind again and again, as these processes have been unfolded, that the base of civil operation in this country is a constituency of human beings, which from time to time are more or less arbitrarily set off into different, and often into antagonistic, classes. The large division thus far has been into slave and free. The enslaved are grouped with the free negroes in most of the commonwealths, and the

two are subjected to the same constitutional provisions, the same laws, the same social discrimination. The startling exception inaugurated by the State of New York in 1821,* when the free black was given the right to vote—though under harder conditions than that right implied in the case of white men—was an attack upon slavery which could never be successfully repelled. From the time it was made dates the decay of slavery in America, because its stronghold had been seized—the commonwealth itself, which, by the axioms of slavery, had exclusive control over the institution. The national government ultimately took up, and, in co-operation with the majority of the commonwealths, carried on the war against slavery, making national that which at first was only State action. The Union proved indestructible because the States are indestructible. Had not the idea of interstate rights of citizenship, dictated by economic necessities, lain at the foundation of American government, the epoch-making act of New York would have been limited in its operation and effects to that commonwealth.

The free group was subdivided, somewhat like the slave, into a more and into a less favored class—into a class that possessed civil and political privileges, and into another which possessed civil privileges only. The political estate, from the days of the Revolution to the time of the Missouri Compromise, was not one in common. Many

* Vol. i., p. 371.

feudal traces remained. There were white men who voted; there were other white men to whom the suffrage was denied. Yet all of the free class were under constitutions and laws, which, in their intent and operation, plainly classed freemen in a group wholly distinct from the compound group of slaves and free negroes. The civil process going on in the country included all classes, free and slave, and tended, though slowly, to bring all into a constituency politically homogeneous. Not only was the tendency to make all negroes alike in civil status, but also to make all white men alike. The process was worked out first for whites, and, before 1850, manhood suffrage prevailed for whites throughout the country. What exceptions, of a local character, remained, were the objects of incessant attack, as in Rhode Island in 1842. The details recorded in the civil affairs of Louisiana, Kentucky, Michigan, and California merge into civil and social organization when understood in their application to the growth of a constituency. If we keep our eye on the citizen — who sometimes is only an inhabitant — and follow him through all the vicissitudes of his career in this country, we shall have clearer notions of what constitutions of government mean. We are dealing with persons, though things often obscure them. Constitutions and laws and the machinery of administration exist for persons. The civil process is of the government of persons. This fundamental kept in mind, the process becomes clear.

But from 1800 to 1850 many States reorgan-

ized, or for the first time formulated, their civil institutions. Doubtless the four whose procedure is given in detail illustrate and typify the other twenty-seven. To what extent this is true can best be known by comparison. A portion of that comparison has already been drawn in the preceding volume, in the chapters entitled "The Form of Democracy in the Eighteenth Century,"* "The First Organization of Government in the States,"† and "The Constitutional Elements."‡ It remains now to complete the comparison by tracing the growth of our institutions generally from 1800 to 1850. The chapters on Louisiana, Kentucky, Michigan, and California present the methods by which an American constituency enters upon the work of civil organization and carries it through. Keeping in mind the general character of this process, and remembering that each American constitution is produced in a like manner, let us now enter upon an examination of the constitutional changes which distinguish our country during the first half of the nineteenth century. Much will be said of legislators, Governors, and judges, of corporations and constitutional limitations. Much appears that may seem irrelevant, obscure, perhaps unimportant. But the main theme is the citizen—his rights, privileges, and activities. Behind this constituency of men is a constituency of ideas. Ethnic and ethical forces are at work shaping our institutions. A composite people is in process of be-

* Chap. ii. † Chap. iii. ‡ Chap. iv.

coming homogeneous and creative. Through all this thought and action runs the cheering personification of that altruism which, in the final test, will be found to distinguish American civil institutions.

CHAPTER XIII

A HALF-CENTURY OF CONSTITUTIONAL CHANGES

Bills of rights may be called survivals in constitutional government.* They respond at last to

* The principal authorities for this chapter and the two following are the State constitutions and laws, 1800–1850, and the proceedings of conventions during this period. (See Vol. i., pp. 29–32, notes):

New York, 1801.—Journal of the Convention of the State of New York, Begun and Held at the City of Albany, on the 13th day of October, 1801. Albany: Printed by John Barber, Printer to the Convention, MDCCCI, 42 pp.

Ohio, 1802.—Journal of the Convention of the Territory of the United States Northwest of the Ohio, Begun and Held at Chillicothe, on Monday, the first Day of November, A.D., 1802, and the Independence of the United States the twenty-seventh. Published by Authority. Columbus: George Nashee, State Printer, 1827, 42 pp. Also printed in the Report of the Secretary of State of Ohio, 1876, pp. 35–74.

Connecticut, 1818.—Journal of the Constitutional Convention of Connecticut, Held at Hartford in 1818. Printed by order of the Legislature. Hartford: Case, Lockwood & Brainard, Printers, 1873, 121 pp. Historical Notes on the Constitutions of Connecticut, 1639–1818. Particularly on the Origin and Progress of the Movement which resulted in the Convention of 1818 and the adoption of the Present Constitution; by J. Hammond Trumbull. Hartford: Brown & Gross, 1873, 69 pp. The Connecticut constitution of 1818 (Hartford, August 20th to September 16th) was made by two hundred and one delegates. John Treadwell served as Governor, 1809–1811; Oliver Wolcott, 1818–1827; Gideon Tomlinson, 1827–1831. William Bristol and Pierpont Edwards were appointed United States district judges; Stephen M.

changes in the State. Every item is a condensed chapter on civil polity. Sometimes they contain only temporary provisions, but at the time of their incorporation in a constitution these were sup-

Mitchell, Nathan Smith, James Lanman, and Gideon Tomlinson, as United States Senators; thirteen others became members of Congress.

Maine, 1820.—See Vol. i., p. 253, note.

Massachusetts, 1821.—See Vol. i., pp. 160, 203, notes.

New York, 1821.—Report of the Debates and Proceedings of the Convention of the State of New York; Held at the Capitol, in the City of Albany, on the 28th Day of August, 1821. By L. H. Clarke. New York: J. Seymour, 49 John Street, November, 1821, 367 pp. The same convention, reported by N. H. Carter and W. L. Stone. Albany: E. & E. Horsford, 1821, 703 pp. Journal of same. Albany: Contine & Leake, 1821, 564+xii. pp.

Virginia, 1829–1830.—See Vol. i., p. 405, note.

Delaware, 1831.—Journal of Convention of Delaware, held November 8 to December 2, 1831. Wilmington: 129 pp. Journal of the Committee of the Whole. Wilmington: 44 pp. Debates of this Convention (reported by W. M. Gouge). Wilmington: 1831, 267 pp.

Tennessee, 1834.—Journal of the Constitutional Convention of Tennessee, held May 19 to August 30, 1834. Nashville: 1834, 415 pp. "In the ordinance passed by the Convention, calling for a vote upon the new constitution, it was provided that no one should vote except such as were included in the first section of the fourth article as amended. The effect of this was to disfranchise free negroes before the adoption of the new constitution. The free negroes would have opposed the constitution. The scheme was original, practical, and effective."—Caldwell's *Constitutional History of Tennessee*, p. 144.

North Carolina, 1835.—See Vol. i., pp. 294, 316, notes.

Michigan, 1835.—See Vol. i., 318, note.

Pennsylvania, 1838.—Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to propose Amendments to the Constitution. Commenced and held at Harrisburg, on the second day of May, 1837. Reported by John Agg. Printed by Packer, Barrett & Parke; *Keystone* Office, Harrisburg: 1837, 13 vols. Journal of same. Harrisburg: Printed by

posed to be of permanent interest. The eighteenth-century constitutions were general in character and usually short. Democracy, which relies on laws rather than men, greatly changed the old instru-

Thompson & Clark, 1837, 2 vols., 852 pp., 715 pp. Minutes of the Committee of the Whole. Harrisburg: 1837, 286 pp.

Georgia, 1839.—Journal of the Convention to Reduce and Equalize the Representation of the General Assembly of the State of Georgia Assembled in Milledgeville, on the 6th Day of May, Eighteen Hundred and Thirty-nine. Published by Authority. Milledgeville: P. L. Robinson, State Printer, 1839, 74 pp.

Rhode Island, 1842.—Journal of the Convention Assembled to frame a Constitution for the State of Rhode Island at Newport, September 12, 1842. Printed by order of the House of Representatives, at its January Session, 1859. Providence: Knowles, Anthony & Co., State Printers, 1859, 69 pp. See also Vol. i., p. 401, note.

New Jersey, 1844.—Journal of the Proceedings of the Convention to form a Constitution for the government of the State of New Jersey; Begun at Trenton on the fourteenth day of May, A.D. 1844, and Continued to the twenty-ninth day of June, A.D. 1844. Trenton: Franklin S. Mills, 1844, 297 pp.

Texas, 1845.—Vol. i., p. 344, note.

Louisiana, 1845.—See Vol. i., p. 400, note.

Iowa, 1846.—See Vol. i., p. 343, note.

New York, 1846.—Manual for the use of the Convention to Revise the Constitution of the State of New York, Convened at Albany, June 1, 1846. Prepared Pursuant to order of the Convention, by the Secretaries, under Supervision of a Select Committee. New York: Walker & Craighead, 114 Fulton Street, 1846, 371 pp. Debates and Proceedings in the New York State Convention for the Revision of the Constitution. By S. Croswell and R. Sutton, Reporters for the *Argus*. Printed at the office of the Albany *Argus*: 1846, 948 pp. The same convention reported by William G. Bishop and William H. Attree. Albany: Printed at the office of the *Evening Atlas*, 1846, 1143 pp. Journal of same. Albany: Carroll & Cook, Printers to the Convention, 1846, 1648 pp.

Illinois, 1847.—Journal of the Convention assembled at Springfield, June 7, 1847, in pursuance of an Act of the General Assembly of the State of Illinois, entitled "An Act to provide for the

ments during the first half of the nineteenth century. They became more like laws and less like the constitutions with which the commonwealths began. The change was twofold, conforming to the dual development of the country, North and South. The Northern zone was a greater New England, New York, and Pennsylvania; the South-

Call of a Convention," approved, February 20, 1847, for the Purpose of Altering, Amending, or Revising the Constitution of the State of Illinois. Published by Authority of the Convention. Springfield: Lanphier & Walker, Printers, 1847, 592 pp.

Wisconsin, 1847.—See Vol. i., p. 345, note.

Kentucky, 1849–1850.—Vol. ii., p. 1, note.

California, 1849–1850.—Vol. i., p. 346, note.

Michigan, 1850.—Vol. ii., p. 183, note.

Maryland, 1850.—Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, to which are prefixed the Bill of Rights and Constitution as Adopted. Published by Order of the Convention, 2 vols. Annapolis: William M'Neir, Official Printer, 1851, 550 pp., 890 pp. Proceedings [Journal] of same. Annapolis, Riley & Davis, Printers, 1850, 895 pp.+8+36 pp.

Vermont, 1820–1850.—Journals of the Constitutional Conventions of Vermont, 1822, 1828, 1836, 1843, 1850. Printed at Montpelier, St. Albans, Royalton, and Burlington. Journals of the Council of Censors, 1820, 1821, 1827, 1834, 1841, 1842, 1848, 1849. Printed at Danville, Middlebury, Burlington, and Montpelier.

Indiana, 1850–1851.—Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana, 1850. H. Fowler, Official Reporter, A. H. Brown, Printer to the Convention, 2 vols. Indianapolis, Indiana, 1850, 1–1008, 1009–2007 pp. Journal of same, 1085 pp. Indianapolis, 1851.

Ohio, 1850–1851.—Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850–1851. Columbus: S. Medary, Printer to the Convention, 1851, 2 vols., 751, 897 pp.

New Hampshire, 1850–1851.—The Proceedings and Debates of the New Hampshire Convention, November 6, 1850, to January 3, 1851, are preserved in the Concord *Daily Patriot* of that time.

ern zone, a greater Virginia, Carolina, and Georgia. Two streams of humanity were pouring over the country, and the Northern stream was swelled by European tributaries. The Southern stream was American in origin, and but slightly increased by any foreign tributary. Climate was not the sole cause of this—neither was it the soil nor the location of ports of entry. The obstacle in the path of Hannibal was Rome; the obstacle in the path of immigration into the South and Southwest was slavery. After 1835, European immigration rapidly increased, and in less than twenty years it gave the balance of political power to the people of the North.* All this time the Southern States actively excluded foreign immigration, and did not welcome migration from the North. In consequence, the ratio of population between the two sections was gradually becoming two to one in favor of the North.† This and other contrasts were discussed in the Kentucky convention of 1849.‡ The South

* From 1831 to 1840, 599, 125 European immigrants arrived; from 1841 to 1850, 1,713,251. In 1836 there were 13 free and 13 slave States, the House of Representatives consisting of 142 members from free States and 100 from slave. In 1848, the 30 States were equally divided between free-soil and slave-soil; the House consisted of 139 members from free States and 91 from slave States. In 1852 there were 16 free States and 15 slave States, the House consisting of 144 members from the former and 90 from the latter.

† In 1800 the population of the free States was 2,684,616, of the slave States 2,621,316; in 1820 the population of the free States was 5,152,372, of the slave States 4,485,819; in 1850 the population of the free States was 13,599,488, of the slave States 9,663,997.

‡ See Chap. vi.

realized that it was falling behind in wealth and population. Its consciousness of the fact counted as a reason for a separate slave empire stretching into the tropics. Many men of the South did not indulge in the dream. More cherished the vision and worked for its realization as Calhoun saw it. His celebrated letter to King, our Minister to France in 1844, gives the vision in full. After all has been said and written, there will remain one brief conclusion of the whole matter. The Union could not remain half slave and half free. It must become all the one thing or all the other.

While the Union increased from sixteen to thirty-one States, thirty-two new constitutions and one hundred and fifty amendments were adopted. Of these constitutions, nineteen were by Northern States.* They all fall under the general law of migration. When people move, they carry their ideas with them, and none more tenaciously than their notions of politics and religion. Habits of speech and of dress, social customs, styles of architecture, business methods—all these may change, yet some only slightly. Not so with religion and political institutions in a land where change of habitation has not been followed by persecution.

* Maine, 1820; Rhode Island, 1842; Connecticut, 1818; New York, 1821, 1846; New Jersey, 1844; Pennsylvania, 1838; Ohio, 1802, 1850; Indiana, 1816; Illinois, 1818, 1848; Michigan, 1837, 1850; Wisconsin, 1848; Iowa, 1846; California, 1850; Massachusetts (revised in part), 1820; Delaware, 1831; Virginia, 1829, 1850; Kentucky, 1850; Tennessee, 1834; Louisiana, 1812, 1845; Mississippi, 1817, 1832; Alabama, 1819; Missouri, 1821; Arkansas, 1836; Florida, 1845; Texas, 1845.

The man who favored education, internal improvements, responsible banking, town-meetings, and elective offices in New England and New York, invariably favored them when he migrated to Michigan or Illinois, to Iowa or California. He who in Virginia, Carolina, or Kentucky opposed emancipation, township government, free schools, internal improvement, and manufactures, opposed them in Florida, in Arkansas, in Texas, and in California. Stripped of non-essentials, such as variations in salaries, terms, and titles, the commonwealth governments from Maine to California were much alike, and of the New York type. Those from Virginia to Florida were also much alike, and of the Kentucky type. California was a composite; not so much in the letter of its constitution as in its spirit and practical administration. But even in these it leaned to the North rather than to the South, because the South lacked men. Its institutions kept out population, and at last population abolished its chief institution. All this was the work of grinding necessity—not of arms, but of ideas. Political institutions may be called ideas gone to seed.

During this first half of the nineteenth century there were not many changes in the bills of rights. The period was too short, and, moreover, most of the changes that distinguish the bills of rights of to-day from those of the eighteenth century were made after 1860. However, the few changes from 1800 to 1850 were significant. The right of admission into the Union, and the right to prohibit

slavery—the latter the Ordinance of 1787 in brief—were now claimed as civil rights, and were common to the Northern constitutions, especially those west of Pennsylvania. The ordinance had proved to be epoch-making, and was instrumental in hastening the issue between slaveocracy and free democracy. Sanguinary laws were disappearing from the statute-books, and Penn's principle was appearing in the declaration—that "the true design of all punishments is to reform, not to exterminate, mankind." The reform included abolition of imprisonment for debt. This had gradually evolved from sentiment into laws, and from laws into a provision in the bill of rights.* At first, the law applied only to women. The struggle for existence compelled people to cherish and support public schools, and for the first time the world heard of the right to education—or, as sometimes stated, to equal educational privileges. Congress intensified the zeal for schools in its munificent grants of public lands for their support.

The importance of a single word in a constitution was well illustrated by the word "property" in the first constitution of Louisiana.† On its

* Ohio constitution of 1802 (bill of rights), Art. viii., Secs. 14, 15.

† The Louisiana constitution of 1812 (New Orleans, November, 1811, to January 22, 1812) was made by forty-one delegates. Four became United States Senators—J. N. Destréhan, James Brown, Henry Johnson, A. J. Porter. P. E. Bossier became a member of Congress. Three were Presidential Electors, S. Heiriart, 1825; P. Bossier, 1829; P. E. Bossier, 1837. The list of delegates is given in the revised statutes of Louisiana, 1856.

interpretation turned the subsequent history of the Union.* Other laws than those abolishing imprisonment for debt were incorporated into constitutional provisions. Public servants were declared to be subject to investigation; the truth could be given in evidence, and the common-law maxim was abolished—the greater the truth, the greater the libel.†

It cannot be said that our constitutions of government as they overspread the country became less religious than in the early days, but the persistency of colonial ecclesiasticism fell away, and the new constitutions one by one ceased to provide for the union of church and State, or for the support of churches by taxation. Religion became a voluntary institution. It lost in ceremony, but it gained in spirit. Perhaps the best evidence of the change going on was the less frequent reference to the Deity in the constitutions. If there was less reference to the kingdom of God, there was more to the brotherhood of man.

A new constitution is usually the response to long and continued public agitation. Thus after a war or a great panic, there is invariably a crop of new constitutions. Laws grow until they choke up the conduits of the State; then public patience ceases; a new system of political drainage is designed and sometimes adopted. The financial troubles growing out of speculation in land, the rage for internal improvements, banks, and fiat

* See Vol. i., Chap. x.

† See Indiana Convention Debates, 1850, Vol. ii., p. 1389.

money, from 1820 to 1837, were the primary causes of most of the constitutions for the next twenty years. In these an effort was made to protect the State from its Legislature, its Governor, its judges, and its administrative officials.

Religious and property qualifications distinguish the earlier plans of the State governments. Because they were undemocratic and discriminated against white men, they were speedily attacked by the reformers, and most of them had disappeared by 1850.* Usually they were abolished by law, but their ultimate fate was written in the bill of rights, and first in Mississippi in 1832.†

Though slavery was the under-current all these years, it was always briefly treated in a constitution. One must turn to the black code to understand it. Not until 1840 was it abolished in the constitutions of most of the Northern States, though already abolished by their laws. Yet its abolition

* Property qualifications were abolished as follows: In Vermont, act of November 12, 1842; religious tests, Rhode Island, act of January 19, 1828; Jews were given the same religious rights as other sects in Connecticut, act of June 6, 1843; proposition to abolish property qualification in New York, act of May 14, 1845; property qualification for jurors abolished, Delaware, January 17, 1832; for electors, Maryland, 1810; the oath of belief in a future state of rewards and punishments substituted, in the case of Jews, for that in the Christian religion, Maryland, February 26, 1825, January 5, 1826.

† The Mississippi constitution of 1832 (Jackson, September 10 to October 26) was the work of forty-seven delegates. Two became Governors of the State—C. Lynch (1835–1837), J. A. Quitman (1850–1851); three, Congressmen—J. A. Quitman, D. Dickson, J. Block. Quitman was a Presidential Elector in 1849. The list of delegates was obtained from the Secretary of State for Mississippi.

must be taken literally. The Northern States, as a section, were not much friendlier to free blacks than to slaves.* Abolition sentiment was somewhat vicarious in these days. Some humane changes were demanded North and South—as illustrated in Kentucky in 1849,† and none more earnestly than the abolition of duelling. Hamilton's premature death in 1804 set the East to thinking, and the thought spread westward. Illinois, in 1848, made duellists and their abettors the special object of constitutional disqualification. But honor always dies hard, and "the code" was still held to be peculiarly the affair of gentlemen, and quite outside of such common restraints as laws and constitutions. In our day we go to Dumas and Doyle and Weyman for our duels. Fifty years ago there was not a man in public life who had not received or sent a challenge; several of them had "killed their man"; Jackson, Benton, Clay, Randolph, were veterans. The code lasted till the North took Washington in 1860. The mere attempt to think of the public men of to-

* See Vol. i., Chap. vii.

† The Kentucky constitution of 1849 (Frankfort, October 1, 1849, to June 11, 1850) was the work of ninety-eight delegates. C. A. Wickliffe served as Governor, 1839–1840; J. W. Stevenson, 1867–1871. James Guthrie, A. Dixon, D. Meriwether, and J. W. Stevenson, became United States Senators; Chrisman, Clarke, Davis, Hardin, Machen, A. K. Marshall, Moore, W. Preston, Stone, Talbott, and Triplett became members of Congress; six served as Presidential Electors — N. Garther, 1829; B. Hardin, 1833, 1845; M. P. Marshall, 1833–1837, 1841; Triplett, 1845; W. C. Marshall, T. W. Lisle, 1849. The list of delegates is found in the convention journal.

day as duellists suggests some of the changes since the day when the constitutional convention of Kentucky refused to make duelling a violation of the constitution.* Kentucky was more interested at that time in declaring the right of property to be above any constitutional sanction—the high-water mark of slaveocracy in a commonwealth—and that "not even in the largest majority" was there the right to control the lives, liberty, and property of freemen. This was the light of 1849. Though now it may seem darkness, there is slight reason for not believing that it then passed for light in more than half the Union. There was less opposition to a constitutional provision abolishing lotteries and the sale of lottery-tickets. If all the tickets could have drawn prizes, there would have been little opposition. If only half of them had proved costly blanks, the anti-lottery wave would have been much belated. Political morality found here a rich text, a ready-made sermon, and an attentive and sympathizing audience. The reform followed easily, and to most people's satisfaction. But lottery companies continued to prosper through the mails. The provisions in the State constitutions against them were practically a dead-letter. The evil was one beyond the reach of the commonwealths.

Though Michigan, in 1850,† incorporated an

* See pp. 126 to 134.

† The Michigan constitution of 1850 (Lansing, March 9 to August 15) was the work of ninety-seven delegates. Robert McClelland was Governor in 1852–1853. Three delegates served

exemption clause in its constitution, it was done, as we have seen, with some doubt of its equity.* It endangered the rights of creditors, and it likewise interfered with the obligation of contracts, if it did not violate them. Public sentiment, which is usually made up by the debtor class, demanded the innovation. It was an incident of life in a new country, and was largely the effect of the new recognition—or, rather, discovery—of the rights of married women. It was essentially a form of life insurance, with the State as the insurer and the debtor as the insured. It was also another evidence that a democratic form of government tends to favor the debtor class. This is inevitable, because they are in the majority. But on the principle of *caveat emptor*, the exemption was included in the new constitutions, and has characterized our supreme laws ever since. Passing the sentiment of the exemption — which is very

in Congress, including Governor McClelland. H. G. Wells was a Presidential Elector, 1841, 1861; C. P. Bush, G. Redfield, 1845; R. Robinson, L. M. Mason, 1849. The debates in the convention give expression to ideas of government generally prevailing in the Northwest at the time. The constitution has much in common with the New York constitution of 1846, the Iowa of 1847, and the Illinois of 1848. See Chaps. vii., viii., ix. The Michigan constitution of 1835 (Detroit, May 11 to June 24) was the work of eighty-seven delegates. Two became Governors—John S. Barry, 1850–1852; Robert McClelland, 1852–1853. Five (including McClelland) became members of Congress; R. Wilkinson was appointed United States district judge. L. Beaufait was a Presidential Elector in 1845. The names of the delegates to the conventions of 1835 and 1850 are given in the journals.

* See Indiana Debates of 1850, Vol. ii., pp. 1153, 1183, and references cited, *id.*, 2102.

beautiful—it may be questioned whether it has strengthened public morality.

Contrasting the bills of rights in the constitutions of the North with those in the constitutions of the South during the first half of the century, they disclose two ideas, bound sooner or later to conflict—in the North, the declaration of the right to education; in the South, of the right of property in man.

Titles count for something even in a democracy. Before the half-century was half over, the two branches of the Legislature were officially known as the General Assembly, the title itself being a survival of colonial times.* Its sessions, with one exception,† were annual, though with the year 1846 a change to biennial was inaugurated in hope of economy and fewer laws.‡ Qualifications for membership in the Senate and the House remained relatively unchanged. The Senator was required to be a few years older than the Representative, who in most of the States was eligible at twenty-one.

* See Report of the Council of Censors, favoring the establishment of a Senate, in their Journal, 1827, p. 46; Journal, 1841–1842, p. 18. See note on Vermont, p. 398.

† Delaware constitution of 1831, Art. ii., Sec. 4.

‡ Alabama constitution of 1819, amended (to biennial sessions) 1846; Missouri constitution of 1820 amended, *id.*, 1848–1849; Iowa constitution of 1846, Art. iii., Secs. 1 and 2, Art. xii., Sec. 9; Michigan constitution of 1850, Art. iv., Secs. 1, 3, and 35; Indiana, 1851, Art. iv., Sec. 129; Ohio constitution of 1851, Art. ii., Secs. 1 and 25; Maryland constitution of 1851, Art. iii., Secs. 1, 14, and 15. For the "semiannual" sessions of Rhode Island, see constitution of 1842, Art. iv., Secs. 2, 3, and 10, and amendments of 1854.

THE QUALIFICATIONS OF SENATORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
Ohio	1802	30	U. S. citizen; 2 yrs. in county. Paid State or county tax.	....	2	Two classes. May originate money bills.
"	1851	....	Resident in county or dist. 1 yr.	....	2	May originate money bills.
La.	1812	27	U. S. citizen; in State 4 years; in district 1.	$1000 in land.	4	Two classes. $4 per diem.
"	1845	27	U. S. citizen 10 yrs.; *idem*.	....	4	Two classes. No parish to have more than 1/8 the number of Senators.
Ind.	1816	25	U. S. citizen; 2 yrs. in State; 12 months in district.	....	3	Three classes.
"	1851	25	*Idem*..........	....	4	Two classes.
Miss.	1817	26	U. S. citizen; 4 years in State.	300 acres or realty equal to $1000.	3	Three classes.
"	1832	30	*Idem*..........	....	4	Two classes.
Conn.	1818	....	Elector..........	....	1	....
Ill.	1818	25	U. S. citizen; 1 year in county. Paid State or county tax.	....	2	Two classes. May originate money bills.
"	1848	30	U. S. citizen; 5 yrs. in State; 1 year in dist.; tax as above.	....	2	Two classes. May originate money bills.
Ala.	1819	27	U. S. citizen; 2 yrs. resident in State; 1 year in district.	....	3	Three classes.
Me.	1820	25	U. S. citizen, 5 yrs.; 1 year in State, 3 months in district.	....	1	....
Mo.	1820	30	U. S. citizen; res. in State 4 yrs.; 1 year in district. Paid State or county tax.	....	4	May originate money bills.

THE QUALIFICATIONS OF SENATORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Continued.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
N. Y.	1821	....	....	Freeholder.	4	Four classes. May originate money bills.
"	1846	....	....	....	2	$3 per diem; 10c. mileage.
Va.	1830	30	Resident of district.	Freeholder.	1	Four classes. May originate money bills.
"	1850	25	"	Elector...	4	Two classes.
Del.	1831	27	State citizen 3 yrs.	Freehold of 200 acres or $1000 in realty.	4	....
Ark.	1836	30	U. S. citizen; State res. 1 year; resident of dist.	....	4	Two classes.
Mich.	1835	21	U. S. citizen; as electors in district.	....	2	Two classes. May originate money bills.
"	1850	21	*Idem*...........	....	2	Single districts. May originate money bills.
Tenn.	1834	30	U. S. citizen; State res. 3 yrs.; 1 year in district.	....	2	May originate money bills.
Pa.	1838	25	State res. 4 yrs.; 1 year in district.	....	3	Three classes.
R. I.	1842	....	....	....	1	$1 a day; 8 cents mileage.
N. J.	1844	30	State 4 years, county 1 year.	Elector...	1	$3 for 40 days; $1.50 for remainder of session; 10c. mileage.
Fla.	1845	25	U. S. citizen; 2 yrs. resident in State.	....	2	Two classes. May originate money bills.
Tex.	1845	30	U. S. citizen; State res. 3 yrs.; 1 year in district.	....	4	Two classes.
Ia.	1846	25	U. S. citizen; State res. 1 yr.	....	4	Two classes.
Wis.	1848	21	1 year in State; an elector.	....	2	Single dists. Two classes. May originate money bills.

THE QUALIFICATIONS OF SENATORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Concluded.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
Ky.	1850	30	U. S. citizen; State 6 years, district 1 year.	....	4	Two classes.
Cal.	1850	....	State 1 year; district 6 months.	....	2	Two classes. May originate money bills.
Md.	1851	25	U. S. citizen; State 3 years; 1 year in district.	....	4	Two classes. May originate money bills.

THE QUALIFICATIONS OF REPRESENTATIVES AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
Ohio	1802	25	U. S. citizen; State 1 yr. Paid State or co. tax.	....	1	....
"	1851	....	Same as Senator.	....	2	....
La.	1812	21	U. S. citizen; State res. 2 yrs.; 1 yr. in county.	$500 in land.	2	....
"	1845	21	U. S. citizen 3 yrs., and State res. 3 years; 1 year in parish.	....	2	....
Ind.	1816	21	U. S. citizen; 1 yr. in county. Paid State or county tax.	....	1	....
"	1851	21	Same as Senator.	....	2	....
Miss.	1817	22	U. S. citizen 2 yrs.; res. of State 2 yrs.; 1 year in county.	150 acres, or $500 in realty.	1	....
"	1832	21	*Idem*..........	....	2	....
Conn	1818	21	Elector.........	....	1	....
Ill.	1818	21	U. S. citizen; 12 mos. in co. Paid State or county tax.	....	2	....

THE QUALIFICATIONS OF REPRESENTATIVES AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Concluded.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
Ill.	1848	25	U. S. cit.; 3 yrs. State; 12 mos. co. Paid State or county tax.	....	2	....
Ala.	1819	21	U. S. cit.; 2 yrs. res. of State; 1 year county.	....	1	Amended, 1846; term made 2 years.
Me.	1820	21	U. S. cit. 5 yrs.; 3 yrs. of State; 1 year district.	....	1	....
Mo.	1820	24	U. S. citizen; 2 yrs. res. State; 1 yr. dist. Paid State or co. tax.	....	2	....
N. Y.	1821	....	....	....	1	Pay, both Houses, $3 per diem.
"	1846	....	....	....	1	....
Va.	1830	25	Resident........	Freeholder.	1	....
"	1850	21	"	Elector....	2	....
Del.	1831	24	3 yrs. State; 1 yr. county.	....	2	....
Ark.	1836	25	U. S. citizen; 1 year State.	....	2	....
Mich.	1835	21	(*See Senate.*)	....	1	....
"	1850	21	" "	....	2	Single districts.
Tenn.	1834	21	U. S. cit.; 3 yrs. res. State; 1 yr. district.	....	2	....
Pa.	1838	21	3 yrs. cit. State..	....	1	....
R. I.	1842	....	....	....	1	....
N. J.	1844	21	2 years in State; 1 year in county.	....	1	....
Fla.	1845	21	U. S. citizen; 2 yrs. res. State.	....	1	....
Tex.	1845	21	U. S. cit.; 2 yrs. res. State; 1 yr. of county.	....	2	....
Iowa.	1846	21	U. S. cit.; 1 yr. of State; 30 days res. in district.	....	2	....
Wis.	1848	21	State res. 1 year. An elector.	....	1	Single districts.
Ky.	1850	24	U. S. cit.; 2 yrs. res. State; 1 yr. in district.	....	2	....
Cal.	1850	21	As electors......	....	1	....
Md.	1851	21	(*See Senate.*)	....	2	....

Residence was State, county, district, or town. The period had slightly decreased since 1800. But as the States began bidding for emigrants the electoral qualifications were reduced practically to a minimum. Louisiana and Mississippi at first required a property qualification of the Representative, but they abolished it in their second constitutions. Louisiana, Delaware, and Mississippi required a large property qualification of the State Senator, and Virginia required both him and the Representative to be freeholders.

The Senators were divided into classes, and thus the State Senate, like the national, was made a permanent body. Less than half the States required either the Senator or the Representative to be a United States citizen. Changes in population caused frequent reapportionments, and these were on a varying basis. Usually, for the House, the unit was that for local government in the State—township or towns in the North, counties in the South. The struggles to secure equitable apportionment were always vigorous;*

* The amendments to the constitution of 1777 were made at Albany, October 13–27, 1801, by a convention of eighty-nine delegates. Aaron Burr presided. Among the members were many who became distinguished in public life. Daniel D. Tompkins was Governor of New York (1807–1816) and Vice-President of the United States (1817–1825); he was at one time United States District Judge. DeWitt Clinton was Governor (1817–1822 and 1824–1827). Burr was United States Senator; eighteen of the delegates served in Congress. William P. Van Ness became a United States District Judge. Adam Comstock was a Presidential Elector in 1805. The amendments effected legislative apportionment. The Vermont constitutional amendments of 1836

of these the most serious was the Dorr rebellion in Rhode Island. The town or township was the unit of measure in all the Northern States, except Pennsylvania, in which, as in the South, the unit was the county. But with this unit historically established, apportionment was yet unsolved. How many people or voters, how much property, should be the basis for one Representative? The answers to this question would be the political history of the States. Representatives were apportioned according to population, according to the number of free white males, according to the number of voters, according to the taxes and the number of white inhabitants, and according to the number of whites and three-fifths of the persons of color. Another difficulty was the size of the House. Most of the States either fixed the number or gave a maximum and minimum, the legislature apportioning at discretion after the periodical census. In the solution of the problem provision was sometimes made for an increase of membership in some ratio of population. Ohio, in 1850,* made most elaborate provision for securing

(Montpelier, January 6–14) were the work of two hundred and twenty-eight delegates, who acted on the ordinance of the council of censors of January 16, 1835. Of the delegates, Jacob Collamer became United States Senator. The amendments provided for a Senate, and reorganized the legislative department in conformity with the system common in other States. See Vol. i., pp. 126, 127, 128, and notes. The list of delegates is given in the journal.

*The Ohio constitution of 1850 (Columbus, May 6 to July 9) was the work of one hundred and twelve delegates. Two served as Governors—J. Vance (1836–1838) and William Medill (1853-

an equitable apportionment, and the effort began a new era.*

The membership of the Senate was supposed to bear a constant ratio to that of the House—usually one to three or one to four; but in States having large cities—Louisiana, Maryland, Pennsylvania, and New York—the restriction on municipal representation affected the Senate. Ceaseless efforts were made to prevent gerrymandering, but not always successfully. Tennessee, in 1834,† sought to avoid it by making up in the Senate for representation lost in the House, but the device did not work well. The Representative thus made up was, like the free negro, a man without a country. His responsibility could not be fixed; to no constituency could he appeal for vindication.

Each State was divided into Senatorial districts, but the single-district system was as yet an innovation. Its merits and demerits were discussed in the Michigan convention of 1850.‡ As the years passed, the two Houses approached a common

1856). Twenty became members of Congress. Ten served as Presidential Electors. See the Debates for list of the delegates.

* Art. xi., Apportionment.

† The Tennessee constitution of 1834 (Nashville, May 19 to August 30) was the work of fifty-seven delegates. William Blount served as Governor from 1809 to 1815; and Newton Cannon, from 1835 to 1839. Blount became United States Senator; ten delegates served in Congress. R. Allen (also a member of Congress) was Presidential Elector in 1817; William Blount in 1825, 1829, 1833; R. Cheatham (also member of Congress) and R. J. McKenning, in 1837. See the journal for full list of delegates.

‡ See Chap. xiii. The single-district system was adopted by Congress in 1842.

type. In colonial and early commonwealth days, they had differed chiefly in their power to levy taxes. By 1850, in thirteen States, a revenue bill might originate in either House. This was a significant change in American democracy. It meant that one old idea, at least, had broken down, and that this spoke in the wheel of checks and balances was superfluous. National functions cleared up very slowly. Federal relations were seldom referred to in a State constitution save remotely, in the now common provision defining incompatible offices, State and national.

If one were to judge of the General Assembly by the compensation of its members during these years, he might conclude that ability was cheap or the thirst for office great. Gradually the constitutions were shortening the regular sessions. Seldom was the pay of a member more than three dollars a day. The presiding officers usually received five. But then, as now, a member had various opportunities "to look around," and sometimes he profited by what he saw. The multiplication of laws against bribery and corruption, and the provisions against them in the constitutions, are evidence that it was supposed to be profitable, then as now, to be a lawmaker. But then, as now, the man who took up politics for a living usually died poor and forgotten.

Michigan set the precedent, in 1850, of providing by its constitution that each member should be entitled to stationery and magazines in amount "not exceeding five dollars." In all the States there began during this period the now expensive prac-

tice of publishing and distributing public documents free. Usually an ex-member had a set of these, specially bound in heavy morocco, with his honorable name in large gilt letters fully displayed. He had this to show for his public services. His wife and daughter often seemed to feel the influence of the books, and were known to refer to them as "the library." The general government taught the commonwealths this expensive habit of publication, and it has gone on increasing until the aggregate collection is quite beyond computation either of cost or numbers. Ours is the first government whose history may be read in printed documents. No complete collection of these exists.

Two radical changes affecting the Assemblies were in progress—one limiting their powers,* the other defining their duties. The first comprises that mass of constitutional provisions forbidding special legislation; the second, less voluminous, making legislation obligatory. The special legislation forbidden related chiefly to slaves, lotteries, banks, fiscal corporations, local indebtedness, divorces, monopolies, the sale of public property, the rate of interest, sinking-funds, change of county or town boundaries, internal improvements, private bills, and the loan of public credit. These are a few of the subjects on which the Legislature was forbidden to make special laws. They began in

* The limitation of the powers of the Legislature was discussed in the constitutional conventions of New York, 1846; Iowa, 1847; Illinois, 1848; California and Kentucky, 1849; Michigan, Ohio, Virginia, and Maryland, 1850–1851.

Ohio in 1803,* and multiplied in every succeeding constitution throughout the Union.

Legislative obligations were less numerous and not so specific. They chiefly affected the steps in legislative procedure, the establishment and maintenance of schools and sinking-funds, the exclusion of free negroes from the State, the codification of the laws, the emancipation of slaves, the registration of births and deaths, the founding of township libraries, the equalization of taxes, the registration of bank-notes, and the care of the deaf and dumb, the blind, and the insane. All these obligations did not spring up in a night. That for education began in Ohio in 1803, and became characteristic of all the Western States. The exclusion of free negroes followed the laws on the subject.† The care of the deaf and dumb was the first to become a State obligation. After 1837, all Legislatures were instructed to secure the people against the abuse of credit by banks, internal improvements, or State, county, or town loans.‡ Democracy was getting confused, and the chief cause was

* Thirty-four delegates made the Ohio constitution of 1802, completing their work November 29, at Chillicothe. Five became Governors of the State—Edward Tiffin (1803–1807), Thomas Kirker (1807), Samuel Huntington (1808–1810), Thomas Worthington (1814–1818); Jeremiah Morrow (1822–1826). Tiffin, Worthington, and Morrow became United States Senators; Joseph Caldwell, a member of Congress; C. W. Byrd, United States District Judge; Presidential Electors, W. Goforth (1805), and N. Massie (1805–1809). See the journal for list of the delegates.

† See Vol. i., Chap. xii.

‡ For a discussion of these subjects, see the conventions of Ohio, Illinois, Indiana, Michigan, Wisconsin, and Iowa, 1847–1851.

thought to be the grant of unlimited powers, or of discretionary power, to the General Assembly. One immediate effect of the effort to set matters right was the lengthening of the constitutions. They began to grow into commonwealth codes, and have continued growing to this day. The relative increase during the half-century is well illustrated in the three States which have been examined somewhat at length. The constitution of Louisiana of 1814 increased in 1845 in the ratio of three to seven; that of Kentucky of 1799 increased in 1849 in the ratio of two to three; that of Michigan of 1835, in 1850, in the ratio of one to two. In every instance where a State adopted a new constitution, it was more complex, larger, and carefully subdivided with titles and subtitles.

Maine* was the first State to acknowledge in a constitutional provision the paramount authority of the Constitution of the United States. Here and there in the North, local government got a hearing in a convention, and the constitution recognized local boards of control. But of municipal government nothing was said, except to prevent the city vote from controlling the Legislature. Our cities throughout this half-century were only overgrown and badly governed towns. Invention

* The Maine constitution of 1820 (Portland, October 11–27, 1819; January 5–7, 1820) was made by two hundred and ninety-three delegates. William King was the first Governor of the State (1820–1822). John Holmes, John Chandler, Ether Shepley, and Judah Dana became United States Senators; three delegates served in Congress. See either the journal or the Debates for full list of the delegates.

and discovery had not yet made valuable that unknown estate that we call public franchises. Transportation by rail and steamboat was in its infancy, and, like most pioneer enterprises, did not yet pay. But the small sectional railroads branching out from Boston, New York, Philadelphia, and Baltimore presaged the trunk-lines of the near future. The Erie, then the longest road in the world, extended four hundred and fifteen miles, and was considered a more wonderful piece of engineering skill than any of the transcontinental lines in our day. Through cars, through tickets, through baggage, sleeping-coaches, and dining-cars were unknown. Probably the silence of the constitution as to cities is chiefly due to their relative unimportance. At the opening of the century, twenty-four out of twenty-five of the population lived in the country; in 1850, seven out of eight. Railroads had not yet been sufficiently extended over the country to concentrate population in towns. Invention had not yet filled the land with cunning machinery and thrown millions of men out of employment. Farming, the principal occupation of the people, was carried on by hand. This was the chief reason why people stayed in the country and why municipal government attracted scarcely any attention, either in constitutional conventions or in Legislatures. What there was of city government was chiefly of the nature of a crude police system. That city whose inhabitants could walk the streets in safety was supposed to be well governed. At night, when the moon shone, the town was illuminated.

The larger cities flickered in the darkness of sperm-oil lamps. Every freeholder was a fireman. His leathern bucket, duly marked with his own name and that of his company, hung near his bed, ready for instant use. To-day, these relics are quaint evidences of a forgotten type of city government.

The constitutions of the eighteenth century were somewhat hastily made, and usually by the Legislature. During the following half-century the powers and functions of the constitutional convention were quite clearly worked out. The process of revision or amendment was more definite than before. The initiatory steps were usually taken by the Legislature. A second confirmed the recommendations of the first, and submitted the question of a new constitution, a convention, or an amendment to popular vote. In some States propositions of this kind could only be made at regular intervals. Sometimes the question of calling a convention was, by joint resolution, submitted to the electors as the first step in the reform. Delaware made it almost impossible to have a new constitution.* The practice of promulgation—in-

* The Delaware constitution of 1831 (Dover, November 8 to December 27) was chiefly the work of John M. Clayton, though it was adopted as the work of thirty delegates. Clayton, at the time, was in his thirty-fourth year. He was graduated at Yale in 1815; served in the State Legislature, 1824; Secretary of State for Delaware; United States Senator, 1829–1836; Chief Justice of Delaware, 1837–1839; again United States Senator, 1845–1849; Secretary of State, 1849–1850, during which time he negotiated the Clayton-Bulwer Treaty (see Treaties and Conventions, pp. 440–444); again in the United States Senate, 1851–1856—the time of his death. The unique feature of the constitution of 1831

cident to Revolutionary times—by degrees gave place to the better one of popular ratification, though some Southern States did not fall in with the innovation. In the aggregate, this meant that a convention was no more than a special body of men—a grand committee of the State—to submit a plan of government to the electors. Usually a new constitution was not a party proposition. From 1776 to 1854, fifty-four constitutions were in force; the amendments were—five to the bills of rights, six affecting the electors, sixteen to the executive, thirty-five to the judiciary, forty-three to the Legislature, and forty-four to the administrative. This grouping of public interests doubtless illustrates with fair accuracy the relative necessity for change in the general plan of commonwealth governments. They may be more briefly classified as changes limiting power and fixing duty and responsibility. The remarkable growth of the administrative department shows the trend of all modern reforms.

To the chief executive of the commonwealth all the constitutions gave the title Governor. His functions had increased in importance after the country got on a peace footing. His term was

was the provision regulating amendments (Art. ix.). It made amendments, or a new constitution, almost impossible. This fact probably explains a saying heard in Delaware for sixty-five years, that "John M. Clayton made the constitution, locked up the means for a new one, and threw the key in the well." W. Hall, one of the delegates, became a member of Congress. For full list of the delegates, see the Wilmington *Morning News*, November 17, 1896.

lengthened, his powers multiplied, his election was directly by the people. The old colonial distrust was gradually disappearing as people learned that legislation may be foolish, and that the Governor can be made a check upon it.

THE QUALIFICATIONS OF GOVERNORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.

State	Const.	Age	Residence	Property	Term Yrs.	Remarks
Ohio	1802	30	U. S. citizen 12 years; State citizen 4 years.	....	2	[1] No M. C. or officer of U. S. to execute the office.
"	1851	....	....	....	2	[1] As above. No veto power.
La.	1812	35	State citizen 6 yrs.	$5000 in realty.	4	Chosen by joint ballot of Ass'bly from two candidates receiving highest popular vote. [1] As in Ohio.
"	1845	35	U. S. citizen 15 years; State citizen 15 years.	....	4	Chosen by pop'r vote. Ineligible for succeeding term. [1] As in Ohio.
Ind.	1816	30	U. S. citizen 10 years; State citizen 5 years.	....	3	Eligible 6 yrs. in 9. [1] As in Ohio.
"	1851	30	U. S. citizen 5 years; State citizen 5 years.	....	4	Eligible 4 years in 8.
Miss.	1817	30	U. S. citizen 20 years; State 5 years.	600 acres or $2000 in realty.	2	Popular election.
"	1832	30	*Idem*............	....	2	Eligible 4 years in 6.
Conn.	1818	30	U. S. citizen; State citizen.	Freeholder (qualified as an elector).	1	No veto power.
Ill.	1818	30	U. S. citizen 30 yrs.; State, 2 yrs.	....	4	4 years in 8. Salary, $1000.
"	1848	35	U. S. citizen 14 years; State citizen 10 years.	....	4	4 years in 8.

THE QUALIFICATIONS OF GOVERNORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Concluded.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TERM YRS.	REMARKS
Ala.	1819	30	Native U. S.; State, 4 yrs.	....	2 1	4 years in 6.
Me.	1820	30	Native U. S.; State, 5 yrs.	....	1	Incompatible with any other public office.
Mo.	1820	35	Native U. S.; State, 4 yrs.	....	4	Salary never less than $2000. By am'd't, 1822, sal. clause repealed.
N. Y.	1821	30	Native U. S.; State, 5 yrs.	Freeholder	2	....
"	1846	30	U.S. citizen; State, 5 yrs.	....	2	....
Va.	1830	30	Native U. S.; State, 5 yrs.	(See elector.)	3	Ineligible for 3 years.
"	1850	30	*Idem*...........	....	4	Ineligible for 4 yrs. Sal. $5000.
Del.	1831	30	U. S. citizen 12 years; State citizen 6 yrs.	....	4	Ineligible a second time. [1] As in Ohio.
Ark.	1836	30	Native of Ark. or of U. S., or 10 yrs. res. of Ark.	....	4	8 yrs. in 12. [1] As in Ohio.
Mich.	1835	....	U.S. citizen 5 yrs.; State cit. 2 yrs.	....	2	[1] As in Ohio.
"	1850	30	*Idem*	....	2	[1] As in Ohio.
Tenn.	1834	30	U. S. citizen; State cit. 7 yrs.	....	2	6 yrs. in 8. [1] As in Ohio.
Pa.	1838	30	State citizen 7 yrs.	....	3	6 yrs. in 9.
R. I.	1842	....	Elector.........	Elector...	1	....
N. J.	1844	30	U. S. cit. 20 yrs.; State cit. 7 yrs.	....	3	Ineligible for 3 yrs.
Fla.	1845	30	U. S. cit. 10 yrs.; State cit. 5 yrs.	....	4	Ineligible for 4 yrs.
Tex.	1845	30	U.S. citizen; State citizen 3 yrs.	....	2	Eligible 4 yrs. in 6.
Iowa	1846	30	U.S. citizen; State, 2 yrs.	....	4	[1] As in Ohio.
Wis.	1848	....	U. S. citizen; elector in State.	....	2	Salary $1250.
Ky.	1850	35	U.S. citizen; State, 6 yrs.	....	4	Ineligible till after 4 yrs. [1] As in Ohio.
Cal.	1850	25	U. S. cit. and res. of State 2 yrs.	....	2	[1] As in Ohio.
Md.	1851	30	U.S. citizen 5 yrs.; 5 yrs. res. State.	....	4	....

Massachusetts, by amendment, 1822, abolished religious tests.

Administrative functions were not yet fully separated from the executive, chiefly for the reason that this reform was not yet felt to be necessary. A beginning was made, however, by the creation of the office of superintendent of public instruction. The Governor could not attend to the duties of that office. As the State established charitable institutions, homes for the insane, schools for the deaf, the dumb, and the blind, their direction was placed in the hands of administrative officers who reported annually to the Legislature. Commissioners of public lands, of canals, and of banks, were appointed as these interests became a part of the State. Their duties were administrative, and were distinct from those of the executive.

In spite of the triumph of Jefferson's democracy, and its control of State and nation during most of this period, there was no decrease in the executive term nor a general provision against re-election. Usually, as in the eighteenth century, a constitution decided what years in a given number a man might serve. Few States required a Governor to be a citizen of the United States.*

* The Vermont constitutional amendments of 1822 (Montpelier, February 21 - 23) were the work of one hundred and seventeen delegates. Two served as Governor—Jonas Galusha (1809–1813, 1815–1820) and Stephen Royce (1854–1856). David Chase served as United States Senator; Wales, Olin, H. Allen, E. Meach, J. Fletcher, and E. Butler, as members of Congress; as Presidential Electors—J. Galusha, 1809, 1821, 1825, 1829; Meach, 1841. The amendment required the elector to be a native-born or a naturalized citizen. See the journal for full list of delegates.

Early in the period a long residence in the State was required, but after 1835 it was rapidly cut down. Native-Americanism won but twice in the century, and its triumph was short. The age limit was already practically settled. Property qualifications were becoming unpopular, and were ignored before they were abolished.

The first Governors were military chiefs; those of this half-century were civilians. The transition was inevitable in a democracy. Not all the States intrusted the executive with the veto power, probably in the belief that it impaired legislative functions. Only one of the new States—Alabama—omitted the office of Lieutenant-Governor; and but one, Maine, established an executive council. Salaries were small, and because of this it is often said that public men were more patriotic then than they are now.

Life was less ceremonious, less complex, less luxurious. The debate on the compensation of members of Assembly in Michigan, in 1850, discloses public sentiment on this question. In 1821 the salary of the executive varied from six hundred dollars in Rhode Island to seventy-five hundred in Louisiana. Fourteen States then paid two thousand or more; nine States less than two thousand. At this time a member of the Legislature was paid a dollar a day in Rhode Island, and five dollars in Alabama, Mississippi, and Georgia. Twenty-one States paid two dollars or more; three States less than two. The President of the United States then received twenty-five thousand

dollars a year; members of Congress eight dollars a day. Unskilled labor was paid from twenty-five to forty cents a day; skilled, a dollar or a dollar and a quarter. District school-teachers received six dollars a month and were "boarded round," a process only understood by those who have tried it. Ten dollars a month were large wages for a clerk; five hundred a year a princely, if not a sinful, salary for a minister. A physician's visit cost a shilling, and was usually dear at that price. Webster at this time may have had a practice of fifteen thousand a year, and that was considered large. He was then about thirty-three. There were no millionaires. Great merchants, like Abbott Lawrence, were to be found in the large Eastern cities, but such were usually ship-owners, and owed their prosperity to their heavy profits at the edge of civilization. Since barbarism has taken on many of the ways of civilization, the profits of trade are smaller. Seldom did a child have a penny to spend; there was little money in circulation. Clergymen were paid mostly in kind. One member of the flock brought potatoes, another apples, another butter and eggs, another a fairly fat sheep, another a mess of pork, another a bag of flour, another hay for the rebellious animal that dragged the minister's gig up and down the country. The Governor's salary, therefore, was not below his dignity, with farm labor at thirty cents a day and eggs six cents a dozen. Then as now the weary farmer, resting on his hoe-handle in the burning sun and gazing on "his Excel-

lency" as he passed by in a gilded coach, felt that he could afford to be Governor at a smaller salary. Some day, say a hundred years hence, we shall all be pictured as more patriotic than our posterity because our eggs and our Governors cost less than theirs will.

Of the offices filled during the half-century, few were filled more ably than the executive. To become Governor was next to missing the Presidency. Many of the most influential public men of this period served as Governors. Among them were Madison, Monroe, Van Buren, Polk, Tyler, Gerry, Tompkins, Edward Everett, Seward, Marcy, Silas Wright, Oliver Wolcott, DeWitt Clinton, Hamilton Fish, Robert Y. Hayne, Sam Houston (who has the distinction of serving as Governor in two States), Levi Lincoln, J. J. Crittenden, James Iredell, Isaac Toucey, Thomas Corwin, and Isaac Hill. During forty years of this half-century the offices of President and Vice-President were filled by ex-Governors.

Among its changes none were more remedial in their effects than those made in taxation, public finance, and local government. The political economist had not yet become the nation's schoolmaster, so that these three interests were handled in an unhesitating fashion by farmers, mechanics, lawyers, and the world at large that succeeded in getting into the Legislature. These plain people decided that taxes must be raised, and proceeded to raise them without any nice distinctions or theorizing on economic equities. The first thing

was to get the money; the second, and more interesting, to spend it. But tax-payers, who usually are very stupid and penurious people, early in the century detected signs of overtaxation, and straightway a conflict began between them and their agents in the Assembly. Then, as now, everything in sight was taxed, but chiefly land. Poll-taxes were never popular. The new States did not adopt them, and the old ones thought they could not afford to abandon them. Every State was in debt. The newer ones may be said to have been born so, and if they did not cherish their birthright, they found it difficult to get rid of it.

Desire in a new country is prone to outrun performance. Posterity was the chief collateral security of the States, and they mortgaged it to its full value. From early in the century till well-nigh 1840, the American people were spellbound with the delusions of fiat money. A history of human folly would devote many chapters to the Americans of this period. No nation ever tried harder to make money by law. Every acre of land was figured as credit. Personal property easily followed. Men, women, and children were hostages for fiat money, for slaves were property. But fiat money cannot of itself get into circulation. Thus the half-century was an age of fiat-money banks. The ideal was a State bank with branches. No matter how much the issue—the State was behind it. Sovereign word—who could ask for better security? But the State must monopolize the business. Indiana, in 1816, began this

reform.* What could be wiser—a central bank and a branch for every three counties? The capital stock must be equal to thirty thousand dollars in specie. The capital, if not specie, must be equal to it. Alabama, three years later, improved the scheme. Two-fifths of the stock must be reserved for the State, and its control of the bank must be proportional. Half the capital stock must actually be paid—in no case less than one hundred thousand dollars in gold or silver. What was this compared with Biddle's Bank in Philadelphia, whose capital was thirty-five millions? If one of the branch banks refused to pay a bill on demand, the holder was entitled to recover interest, at twelve per cent., till the bank resumed specie payments. Any bank might be made a branch bank by the Legislature. Missouri, in 1820,† forbade its Legislature to incorporate more than one banking company with not more than five branches. No Assembly should establish more than one. The capital stock should not exceed five millions, and of this at least one-half should be reserved to

* The Indiana constitution of 1816 (Corydon, June 29) was made by forty-two delegates. William Hendricks served as Governor, 1822-1825. Robert Hanna, James Noble, and Governor Hendricks became United States Senators. Two delegates were Presidential Electors—D. Robb (1825) and E. McCarthy (1837). The list of delegates is published with the constitution.

† The Missouri constitution of 1820 (St. Louis, June 12 to July 19) was the work of forty-one delegates. A. McNair became the first Governor of the State (1820-1824). D. Barton, Edward Bates, and John Scott served in Congress; Bates became Attorney-General of the United States (1861–1864). The list of delegates was obtained from the Secretary of State for Missouri.

the State. If Congress could go into partnership in the banking business with Nicholas Biddle, could not Alabama and Missouri go into the same kind of business with their own citizens?

But taxes were increasing. In 1836* a State for the first time put in its constitution a reserve clause on the side of the tax-payers. Arkansas then provided that all taxable property should be taxed according to its value, "in an equitable and uniform manner throughout the State." But how should this be determined? No more than the necessary reserve was to be raised. Poll-taxes should be for county purposes, and country produce should not be taxed more than enough to pay for the labor of inspection. The State also made some improvements on the earlier banking laws. The bank and its branches were made the depositories of the State funds, and were required to loan throughout the counties in proportion to their population. "To promote and aid the great agricultural interests of the country," a separate institution was incorporated, a farmers' bank, the faith and credit of the State being pledged to raise funds for the two banks, but their individual stock-holders gave security to guarantee the State against loss. In spite of these precautions, matters

*The Little Rock convention consisted of fifty-one men, and completed its work January 30, 1836. Two members became Governors of the State—J. S. Conway (1836–1840) and T. S. Drew (1844–1848); J. W. Bates, a member of Congress—he had served as a Territorial judge; T. J. Lacey became a United States District Judge. For full list of the delegates, see U. M. Rose's edition of the constitution, Little Rock, 1891.

got worse as banks multiplied. The tax-payers began to suspect that the banks were running the State, instead of the State running the banks. As a means of safety, New Jersey, in 1844,* forbade its Legislature to grant a bank charter for more than twenty years, and only with the assent of three-fifths of both Houses. In the following year Florida incorporated the Alabama and Arkansas provisions, with much elaboration.

In the constitution of New York, a year later,† the first definition of the term *corporation* was attempted in a constitution. It should "be construed to include all associations and joint-stock companies having any of the powers and privileges

* The New Jersey constitution of 1844 (Trenton, May 14 to June 29) was the work of fifty-eight delegates. Four became Governors — Mahlon Dickerson (1815–1817), J. H. Williamson (1817–1829), P. T. Vroom (1829–1832), C. C. Stratton (1844–1848); Dickerson, A. G. Cattel, and J. C. Ten Eyck served as United States Senators; ten others (including Stratton and Vroom), as members of Congress. Dickerson was Secretary of the Navy (1834–1838); Vroom, a Presidential Elector (1853); J. C. Hornblower (1861, 1869) a Presidential Elector. The journal gives the list of delegates.

† The New York constitution of 1846 (Albany, June 1 to October 9) was framed by one hundred and twenty-eight delegates. Two became Governors—W. C. Bouck (1843–1845) and S. J. Tilden (1875–1877). Mr. Tilden was nominated for President by the Democratic party, at St. Louis, June 27–29, 1876. Samuel Nelson was appointed to the United States supreme court in 1845. Twenty-one delegates became members of Congress; six were Presidential Electors—C. T. Chamberlain (1833), D. Munro (1837), J. T. Harrison (1841), Charles O'Conor, W. Taylor, and A. F. Vache (1853). This constitution was the immediate precedent for Iowa (1847), Illinois (1848), and Michigan (1850). For list of delegates, see either edition of the Convention Debates or the journal.

of corporations not possessed by individuals or partnerships," a precedent for all the later constitutions of the commonwealths. In New York at this time the effect of the panic of 1837 was traceable in the constitutional provision forbidding the Legislature to "pass any act granting any special charter for banking purposes," or "to pass any law sanctioning in any manner, directly or indirectly, the suspension of specie payments by any person, association, or corporation issuing bank-notes of any description." All bills or notes "issued or put in circulation as money" were registered for the purpose of amply securing their redemption in specie. The stockholders in any corporation and joint-stock association for banking purposes which issued bank-notes, or any kind of paper credit to circulate as money, were made individually responsible to the extent of the amount of their respective shares for all debts and liabilities contracted after the first day of January, 1850. In case of the insolvency of any banking association, the holders of its bills were its preferred creditors.*

Iowa, in the same year,† went further than New

* The fiscal provisions of the New York constitution of 1846 embodied the substance of the earlier banking laws of the State which public experience had approved. These laws and this constitution began the era of responsible banking in the United States.

† The Iowa constitution of 1846 (Iowa City, May) was made by thirty-two delegates. S. Leffler became a member of Congress; J. S. (or I.) Selman, a Presidential Elector (1853). The constitution contains much in common with that of New York (1846), Illinois (1848), and Michigan (1850). See the journal for names of delegates.

York in seeking to secure a safe system of banking. If a State bank was established by the Legislature, it should be founded " on an actual specie basis," and its branches be "mutually responsible" for each other's liabilities upon all notes, bills, and other issues intended to circulate as money. In this State the Assembly could not charter a bank unless the people at an election had first formally given their consent. The Legislature could enact but one banking law, and that should provide for the registry and countersigning by an officer of the State of " all bills or paper credit designed to circulate as money." It also should require security to the full amount of this credit, which was to be deposited with the State treasurer in United States stocks, or in interest-bearing stocks of commonwealths in good financial standing, and to be rated at ten per cent. below the average value of these stocks in the city of New York for the thirty days next preceding their deposit. In case of a depreciation of any portion of the stocks to the amount of ten per cent., the banks owning the stock were required to make up the deficiency by depositing additional stocks; the law was also to provide for the recording of the names of all stockholders, the amount of stock held by each, the time of any transfer, and to whom made. The provision for the liability of the stockholders and for preferred creditors was the same as in New York. No suspension of specie payment by a banking institution should be permitted, and any change in the law for the organization or creation of corpora-

tions, or for granting special or exclusive privileges, could be made only with the consent of two-thirds of both branches of the Legislature.

In the constitutions of Wisconsin* and Illinois,† made two years later, the articles on finance and corporations were yet more elaborate. Following precedents already common in the Union, Wisconsin declared that taxes throughout the State should be uniform, and that an annual tax should defray the estimated expenses of the State for each year.‡

*The Wisconsin constitution of 1847 (Madison, December 15, 1847, to February 1, 1848) was made by sixty-nine delegates. J. T. Lewis served as Governor (1863–1866); O. Cole, C. H. Larrabee, and M. L. Martin served in Congress; A. Warden was a Presidential Elector (1865–1869). See the Debates for names of delegates.

†The Illinois constitution of 1847 (Springfield, June 7 to August 31) was the work of one hundred and forty-five delegates. Two served as Governor — N. Edwards (1809–1818, 1826–1830), J. M. Palmer (1869–1873). The latter was United States Senator (1891–1897), and was nominated for the Presidency of the United States by the National Democratic party, at Indianapolis, September 3, 1896. Edwards became United States Senator. Nine delegates became members of Congress; four, Presidential Electors — W. Allen (1845), C. H. Constable (1857), J. M. Palmer (1861), S. A. Hurlburt (1869); Hurlburt became also a member of Congress. The Illinois constitution of 1818 (Kaskaskia, August 26) was the work of thirty-three men. Jesse B. Thomas, one of the delegates, was chosen one of the first United States Senators (1817–1829), and was the principal author of the Missouri Compromise. See Vol. i., Chap. x. For the names of delegates see Davidson and Stuvé, p. 297. See the journal for list of the delegates.

‡ See pp. 120, 121, and 124.

CHAPTER XIV

CORPORATIONS, FINANCE, LOCAL GOVERNMENT, AND EDUCATION

It is from this time that articles on corporations were introduced into State constitutions and rapidly lengthened. Until this time the principal corporations for which constitutions particularly provided were banks or moneyed institutions. Wisconsin and the later States included in their articles on corporations provisions for corporations other than those with banking powers and privileges—such as municipal corporations, and, later, railroad and canal corporations. Wisconsin forbade any municipal corporation to take private property for public uses without the consent of the owner, the necessity for the seizure being first established by the verdict of a jury—a specific application of a provision in its bill of rights. Closely following a constitutional provision of New York, made two years before, Wisconsin empowered its Legislature to provide for the organization of cities and of incorporated villages, and made it obligatory on the Legislature to restrict their power of taxation, of contracting debts, or loaning their credit. Banking corporations should henceforth be created only by general law, and, as in Iowa,

the question of "bank or no bank" should first be submitted to the voters at a general election.

Illinois, also following New York, authorized the creation of corporations not possessing banking powers and privileges only by general laws, except for municipal purposes, or in cases in which, in the judgment of the Assembly, the objects of the corporation could not be attained except by special legislation. Thus, more specifically than New York, Illinois made the incorporators individually responsible for the debts of the corporations, but no State bank was to be created, nor could the State own or become liable for any stock in any corporation or joint-stock association established for banking purposes. To guard against further abuses, no act of the General Assembly authorizing banking corporations could go into effect unless it had been submitted to the people in a general election and had been approved by a majority of the votes cast. As in Florida three years earlier, provision was made for the passing of liberal laws of incorporation for the purpose of encouraging internal improvements.

Florida* and California† provided that taxes

* The Florida constitution of 1838 (St. Joseph, December 3) was the work of forty-three delegates. William Marvin became Governor (1865-1866); J. D. Wescott and E. C. Cabell, members of Congress; Marvin and R. C. Allen, United States district judges; R. R. Reid had served as a Territorial judge. The constitution bears the date of the admission of the State into the Union, March 3, 1845. See acts and resolutions of the General Assembly of the State of Florida, Fifth Session, 1851, Constitution, p. xxii.

† The California constitution of 1849 (Monterey, September 3

should be uniform, the latter State also providing for the election of local assessors and collectors of taxes. Virginia * declared that taxation should be equal and uniform, and that all property other than slaves should be taxed in proportion to its value. Every slave who had attained the age of twelve years was assessed "a tax equal to and not exceeding that assessed on land of the value of three hundred dollars." Slaves under that age were not taxable. Other taxable property might be exempted from taxation by a vote of the majority of the whole number of members elected to each House. On every white male inhabitant who had attained the age of twenty-one years, a capitation tax equal to the tax on land of the value of two hundred dollars was levied. One equal

to October 13) was the work of forty-eight delegates. J. McDougall became Governor (1851–1852); W. M. Gwin, United States Senator (1849–1861); E. Gilbert, a member of Congress; and as Presidential Electors, W. S. Sherwood (1853) and A. M. Pico (1861). H. W. Halleck became a major-general and greatly distinguished himself during the civil war. See the Debates for list of the delegates.

* The Virginia constitution of 1850–1851 (Richmond, October 14, 1850, to August 1, 1851) was the work of one hundred and thirty-five delegates. Two became Governors—H. A. Wise (1856–1860), John Letcher (1860–1864); James Barbour served as United States Senator from Virginia, and Charles J. Faulkner and Waitman T. Wilby from West Virginia. Twenty-four delegates (including Wise and Letcher) served in Congress. J. Y. Mason was a member of the convention of 1829–1830. Those who served as Presidential Electors were—A. Stuart (1837, 1841, 1845), T. J. Randolph, William Smith (1845), J. Letcher (1849), R. G. Scott, H. A. Wise (1849, 1853). The documents published by the convention are the most complete for the resources, the transportation, the finances, and social condition of a Southern State in 1850. See the journal for alphabetical list of the members.

moiety of capitation tax upon white persons was applied to the purposes of education in primary and free schools. As in Michigan, in this year, Virginia provided for a sinking-fund, the Legislature being directed to set apart annually seven per cent. of the State debt existing on the 1st of January, 1852. This fund was to be invested in bonds of the State or of the United States, or of some of the States of the Union. Whenever a further debt was to be contracted by the commonwealth there should be set apart, in like manner, yearly, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid on the debt at the time of its contraction, which sum should be a part of the sinking-fund. No part of this fund or of its accruing interest could be appropriated by the General Assembly to any other purpose than that for which it was devoted, "except in time of war, insurrection, or invasion."

In the same year Michigan inserted in its constitution two elaborate articles — one on finance and taxation, the other on corporations. All specific State taxes, except those received from the mining companies of the upper peninsula, were applied in paying the interest upon the funds established for the maintenance of the primary schools, the university, and for other educational purposes, and the interest and principal of the State debt, in the order named, until the debt was extinguished; then these specific taxes were to be added to the primary-school interest fund. The

annual taxes should be sufficient to pay the yearly expenses of the government. The Legislature should also provide a sinking-fund of at least twenty thousand dollars a year. A uniform rule of taxation should apply to the whole State, except on property paying specific taxes, and all assessments should be on property at its cash value. Following the precedent set in Iowa and Illinois, Michigan forbade the Legislature to pass any banking law until it had been submitted to a vote of the electors and was approved by a majority of them. The New York provisions on the liability of stockholders and on preferred creditors were repeated; and, like New York and Iowa, Michigan forbade the suspension of specie payments. The definition of corporations made four years before in New York was repeated in this constitution, and the condition of the State at this time is in part suggested by the provision limiting the incorporation of railroad, plank-road, and canal companies to thirty years. The struggle between individuals and corporations had already begun in this country, in evidence of which is the provision in this constitution that no corporation should hold any real estate for a longer period than ten years, except such as was actually occupied by the corporation in the enjoyment of its franchise. The experience of Illinois, New York, and Wisconsin was a precedent for Michigan to empower its Legislature to provide for the incorporation and organization of cities and villages, and to restrict their powers of taxation and indebtedness.

Of the three new constitutions made in the year 1851,* that of Maryland contained no article on banking or corporations, the organization and control of these being left by general grant of power to the Legislature. The constitutions of Ohio and Indiana, however, are a landmark in our civil history, for they elaborately classify the particular functions and interests of the State in separate and elaborate articles. The changes made from 1776 to 1850 in the formulation of the civil interests of American democracy are no better displayed than by contrasting the constitutions of Ohio and Indiana, made in the middle of the nineteenth century, with any of the constitutions of 1776. Both Ohio and Indiana have articles on finance, taxation, and on corporations.† These articles are indeed the initial chapters, in constitutional form, of that yet more elaborate presentation of their subject-matter to be found in the State constitutions adopted during the last quarter of the nineteenth century, and suggest that, to the

* The Indiana constitution of 1850–1851 (Indianapolis, October 7, 1850, to February 8, 1851) was the work of one hundred and forty-nine delegates. Thomas H. Hendricks served as Governor (1873–1877), was nominated for Vice-President at St. Louis by the Democratic National Convention, June 27–29, 1876, and again at Chicago, by the National Democratic Convention, July 8–11, 1884, and, with Grover Cleveland, was elected ; Schuyler Colfax served as Vice-President of the United States (1869–1873). Hendricks and John Pettit became United States Senators ; eight members served in Congress, including Robert Dale Owen and Schuyler Colfax ; Colfax was Speaker of the thirty-eighth, thirty-ninth, and fortieth Congresses. R. D. Owen was a Presidential Elector in 1849. The list of members is given in the Debates.

† For Ohio, Arts. xii. and xiii. ; for Indiana, Arts. x. and xi.

constitutions of the twentieth century, they may bear a relation (in the scope and manner of their presentation of corporation and financial interests) similar to that borne by the constitutions of 1776 to those of 1850. Indeed, they suggest the gradual evolution of financial constitutions sufficiently grounded on past experience to enable the people of the several commonwealths ultimately to avoid in large measure abuses of fiscal principles, and to realize much that is implied of advantage to the State in the current phrase, "an equitable system of taxation and an economic distribution of public funds." May it not be expected that the evolution of financial principles in the constitutions may ultimately enable the American people to avoid panics?

The provisions of the article on finance in the Indiana constitution followed familiar precedents. The rate of taxation should be equal and uniform throughout the State, but the provision prescribing this uniformity differed from its precedents in older constitutions by exempting from taxation the property used for municipal, educational, literary, scientific, religious, or charitable purposes. The experience of the older States is plainly traceable in the article on corporations. Banks should be established under general banking laws; the paper issued by the bank and designed to circulate as money should be registered, and also be countersigned by a State officer. The collateral security of a bank should be readily convertible into specie, and be under the control of the fiscal officers of

the State. The branch banks might be chartered without collateral security, but the branches should be mutually responsible for one another's liabilities upon all paper credit used as money. As in New York, Iowa, and Michigan, the holders of bank-notes in case of the insolvency of the bank were declared to be preferred creditors; all bills or notes of the bank were redeemable in gold or silver, and no law could be passed sanctioning the suspension of specie payments.

A new inhibition was made, forbidding any bank to receive, directly or indirectly, a greater rate of interest than allowed by law to individuals loaning money. No bank could be chartered nor continued as a banking organization for more than twenty years. The State might invest its trust funds in a bank and its branches, but the safety funds were to be guaranteed by unquestionable security. After the expiration of bank charters in force in 1851, the State could not become a stockholder in any bank, nor loan its credit in aid of any person, association, or corporation. The liability of the incorporators for the debts of the corporation was left to be determined by law—a less efficient security than experience plainly pointed out. Ohio forbade a poll-tax for county or State purposes, and obligated its Legislature to make uniform rules for the taxation of property. A poll-tax was never popular among the people of the States, principally because it seemed to be a price for voting—a right to which they deemed themselves freely, indeed naturally, entitled. As in Indiana, the prop-

erty of public charities, buildings used exclusively for public worship, and public-school houses, were exempt from taxation; and burying-grounds were added to the list. At this time Ohio introduced into its constitution an exemption clause for the benefit of individuals. Personal property to an amount not exceeding in value two hundred dollars was declared exempt from taxation. The complaint long made in Ohio, and indeed in other States, was at last nominally redressed by this constitution, in a provision which enacted that "all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." The annual expenses of the State should be paid by its yearly revenue, and sufficient taxes should also be levied to pay the interest of the State debt. Varying somewhat from the other States in one particular, Ohio forbade the contraction of any debt by the State for purposes of internal improvements. In its article on corporations it sought to correct an evil already too common in the country, by its forbidding the General Assembly to pass any special act conferring corporate powers, and by making the property of corporations, like that of individuals, subject to taxation. The New York provision making the stockholders individually liable for the debts of corporations was repeated. Ohio attempted to check the aggressions of railroad companies by providing that no right of way should be appropriated to their use until full compensation had first been secured by a deposit of money for the

compensation of the owner whose property was desired, irrespective of any benefit from the improvement proposed. The amount of compensation should be ascertained in a court of record by a jury of twelve men. The provision, now common in the constitutions of the Northern States, for the organization of cities and for the restriction of their powers of taxation and indebtedness, was introduced, as was also a provision for submitting proposed bank laws to the electors.

Thus it appears that during the first half of the nineteenth century American democracy evolved elaborate constitutional provisions affecting the levying of taxes, the appropriation of public money for internal improvements, the organization of banks and the control of their business; the responsibilities of stockholders in corporations, and the prior claims of certain classes of creditors; the equity and uniformity of tax laws; the limited responsibility of local governments—such as villages, cities, and counties—in the matter of taxation; the loan of their credit and the creation of indebtedness; the powers and privileges of railroad, plank-road, and canal companies; the relative rights of these and individuals in disputes arising between them; the power of the General Assembly to create indebtedness, and especially the "pay-as-you-go" policy prescribed in the requirement that annual expenses should be met by annual taxes; the exemption of some kinds of property from taxation—chiefly those used for educational, religious, and charitable purposes—in brief, a clearer defini-

tion of the functions of the State than had existed in the eighteenth century. While the provisions affecting corporations were becoming more numerous and elaborate, those defining the educational obligations of the State were likewise increasing.

One by one the States made provision for carrying out systems of public education, and gradually put the public schools under the direction of superintendents of instruction, thus again illustrating the principle of government that civil affairs must be intrusted to trained minds. It should not be forgotten that the free public schools of the United States had their inception between 1840 and 1850, except in the New England States, in which they had been fostered much earlier. With few exceptions outside of New England, there was no provision for the free education of the poor. In most of the States there were rate schools of a primary character, and academies, institutes, and seminaries in which payment was demanded for tuition, and, excepting instruction by tutors and governesses, these were for a long time the only method of obtaining an education. Though these means were effective to the extent that they were available, it was not until after 1850 that America can be truly said to have had free public schools. It was after this time that, in the Western States particularly, the revenue from the public lands began rapidly to be converted into school funds, enabling the Western States to surpass so swiftly the Eastern in the opportunities which they af-

forded for public education. The Eastern States, by utilizing the land-scrip voted them by Congress, derived some support for agricultural and scientific schools; but the chief burden of education fell upon the tax-payers, a burden far less heavy in the States created out of the public domain. The unparalleled growth of the University of Michigan is an illustration of the interest, efficiency, and direction of educational matters in an American commonwealth whose foundations were laid in the eighteenth century and whose boundaries were once within the public domain.

No public enterprise during this period was more popular than the organization of free public schools. The American people took hold of educational problems with an almost passionate confidence that universal education would solve all the ills of life. Indeed, in various parts of the country, as in New York and New Jersey, there were expressions of a desire to prescribe an educational qualification for the voter. This zeal for education, however, was not sufficiently altruistic to include any other than the white race. There were no schools for colored persons in slave-holding States, and schools of this character were unpopular in the free States. That in New England itself, a school established for the education of colored girls should be destroyed by a mob proved that American democracy, in considering educational facilities, was as yet strictly a white democracy. The teaching of the black was not a right which the white man was bound to respect.

If the forces contending for the mastery in this country were those of universal education and those for recognizing the right of property in man, education was in a great degree false to its character. The discrimination made against persons of color in the free commonwealths contributed to strengthen the cause of human slavery. It seems disheartening to trace the evolution of our social institutions, our laws, and our constitutions of government, so tardy is their recognition of the rights of all men to equal opportunities for life, liberty, and the pursuit of happiness. American democracy was as yet but a democracy in name. Nevertheless, obligations imposed upon State Legislatures during this half-century were generally altruistic in character. They were witnesses to the nature of our civilization, founded upon Christian, not pagan, ideas of morality.

The principal contest in American democracy may be said to have been between individualistic and communistic forces in the evolution of our forms of government. In the eighteenth century all the forces of the State were organized for the advantage of the individual rather than for the community. This found expression in nearly all laws establishing schools, founding benevolent institutions, and ever more perfectly forming American democracy on a civil instead of a military basis. After 1840 an altruistic effort was made on a vast scale in this country. The powers of legislation were thus made to contribute to the general welfare, and yet, as far as possible, without limit-

ing the privileges or denying the rights of the individual. To this course of altruism there were exceptions, as in those obligations to perpetuate slavery or to discriminate between free persons of color and other freemen. These discriminations, after all, only illustrate the course and the nature of the evolution going on. As we follow the making of the West, we notice how each new State makes elaborate provisions for the free education of its people. This provision for free education was made obligatory on State Legislatures. As yet there were no obligations on the Legislature to enact laws protecting the individual against corporations, syndicates, or trusts, for these had not then threatened to endanger individual rights; few such organizations existed. The struggle unconsciously recorded in these limitations and obligations on legislative bodies is a struggle between free industry and slavery, between ignorance and knowledge, between the use and abuse of public credit. The intensity of that altruism which dictated these limitations and obligations will not diminish, and the more perfect union in course of evolution will be the realization of social efficiency and of the equal opportunity of all men.

Local government was passed over by the eighteenth-century constitutions, and was but slightly touched on by those made during the first half of the nineteenth. It was largely a matter of custom or of legislation. In the older States local organization had already been established when their first constitutions were in process of formation.

In the North, the organization was of the town or township type; in the South, of the county. Town or county government was not an issue at the time of the Revolution. That affected local government only indirectly. The issue was popular government *versus* monarchy; the civil *versus* the military idea in government. America was then a democracy of farmers.

The limitation of indebtedness was the first provision affecting local government to be inserted in a commonwealth constitution. The second made certain township offices elective. The third was an effort to secure proportional representation among the counties. But the silence of the newer constitutions did not signify that local government was not a question of profound interest to the people. In the Western States they had a choice of local systems—the New England town, the Virginia county, or a partial combination of the two. The immigrants from New England and New York carried with them the idea of the town, and set it up as a working institution in the Northwest. The immigrants from Virginia and the Carolinas* repeated the county or-

* The amendments to the North Carolina constitution of 1776, adopted in 1835 (Raleigh, June 4 to July 11), were made by one hundred and eight delegates. Four served as Governors—John Branch (1817–1820), D. L. Swain (1832–1835), R. D. Spaight (1835–1837), and J. M. Moorhead (1841–1845). Branch and Nathaniel Macon served as United States Senators; thirteen served in Congress—Macon, as Speaker of the seventh, eighth, and ninth. Seven were Presidential Electors—W. Gaston (1809), J. M. Moorhead, J. Crudup, and John Giles (1825, 1829); Moorhead again in 1833, J. Wellborn (1841), and Kenneth Raynor (1849). The debates in this conven-

ganization when they settled the Southwest. Thus greater attention was given to the subject in the North because local interests were there within local control. The town meeting regulated all public interests of the community. This was impossible under the county system. But gradually a civil ratio was discovered between local government and the constitution of the State. The earlier conventions were satisfied to leave the control of local interests in the hands of the Legislature, and, in consequence, during the first forty years of the century, private acts far outnumbered public, and local laws those of a general nature. From this it followed that much confusion in local arrangements prevailed in all the Northern States, for there were often several types of towns in the same commonwealth.

The Southern States seem to have been satisfied if they prevented a gerrymander. The Northern did not rest until each town was a little State controlling its own affairs. Indiana began a reform in 1816 by requiring all local officers to reside within their respective districts, but New York, in 1821,* was the first State to introduce

tion are the only ones extant, from the South, on the abolition of religious qualifications, and the abrogation of the right of free negroes to vote. See the Debates for names of all members.

*The New York constitution of 1821 (Albany, August 28 to November 10) was the work of one hundred and twenty-six delegates. Martin Van Buren became Governor (1829–1830), Vice-President of the United States (1832 – 1836), President (1836–1840); he served as United States Senator (1821 – 1828); was renominated for President by the Baltimore Democratic Convention (May 5, 1840), by the Free - soil Convention, Buffalo

into its constitution provisions for a local system. It was elementary, but it began a new era. Gradually all local officers were made elective by popular vote, but the reform first affected the mayors of cities by the New York amendment of 1839. The choice by popular election was speedily adopted all over the country.

Tennessee, in 1834, instituted another reform in providing that county elections should not occur on the day for the election of Governor, Legislature, or Congressmen. This was a reform of great practical value, for it concentrated public interest on local questions. Another reform was sought in regulating the minimum area of counties. Gradually the constitutions inserted provi-

(August 9–10, 1848). D. D. Tompkins served as Governor (1807–1816), as Vice-President of the United States (1817–1825), and as United States District Judge. Nathaniel Pitcher was Governor (1827–1829). Samuel Nelson became an associate justice of the Supreme Court of the United States; Henry Wheaton, the reporter of this court (1816–1823). Ambrose Spencer, Chief Justice of the Supreme Court of New York; Nathan Sanford and James Kent, Chancellors of the State. Kent is the American Blackstone. Rufus King, Van Buren, and Sanford served in the United States Senate; twenty-six of the delegates became members of Congress. King was the candidate of the Federal party for Vice-President in 1804 and 1808, and for President in 1816. He was a member of the Federal Convention of 1787. For his part in the compromise of 1820, see Vol. i., Chap. x. Ambrose Spencer was a Presidential Elector in 1809; Samuel Nelson, in 1821. The New York constitution of 1821 was the first specifically to admit free persons of color to the suffrage. It was the most liberal American constitution in force from 1821 to 1846. Its debates rank with those of Virginia of 1829–1830, and together with those of Massachusetts of 1820, interpret the principles of our political institutions as understood at the time in the North. See the journal for names of the delegates.

sions specifying the duties and administrative procedure of local officers, as in Rhode Island in 1842,* but the practice did not grow until after 1850. Reference has already been made to the limitations on legislative power, and many of these affected local governments. Education was one of the largest local interests, and after 1840 the constitutions of States having grants of public lands carefully guarded this interest. Justices' courts grew in importance, and their jurisdiction was made the subject of constitutional provisions. Iowa, in 1847, made it one of three hundred dollars, with consent of parties. In the year following, Illinois incorporated in its new constitution an article on the subject of counties—the first innovation of this kind. It left the form of county government to the will of the electors. They might choose the township or the county type. Wisconsin at this time introduced a provision regulating the proportion of the fund to be raised in the school districts by taxation, and thus joined local and State interests in support of education.

What form of local government would prevail in California was for a time uncertain. That it

* The Rhode Island constitution of 1842 (Newport, East Greenwich, September 12 to November 5) was made by seventy-seven delegates. James Fenner served as Governor (1807–1811, 1824, 1831, 1843, 1845). He was president of the convention. Peleg Wilbur served as Governor in 1833; William Sprague, 1849; E. W. Lawton, 1857; N. R. Knight, 1817, 1821; B. Dimon, 1846, 1847. Fenner, Sprague, and J. F. Simmons became United States Senators. See the journal for the names of members.

would be composite was assured. The New England township, the Virginia county, the Pennsylvania combination of township and county, and the old Spanish system of local government, were the elements to be harmonized. The form was left to the decision of the Legislature.

A significant change was made in Virginia at this time by the subdivision of each county into districts as nearly equal as possible in territory and population, in each of which four justices of the peace were elected for four years and commissioned by the Governor. These comprised the county court. The voters of each county also elected a clerk, a surveyor, a commonwealth attorney, a sheriff, and revenue commissioners. It will be noticed that the recognition of local interests in a Southern State constitution was chiefly of judicial interests and usually by means of a reorganization of the judicial system of the State. On the other hand, in Northern States the recognition of local government was chiefly in its administration by supervisors or commissioners—the recognition of the county or town as a distinct body corporate. This difference is well illustrated in the constitutions of Virginia and Michigan of 1850. Virginia recognized the county no further than as a basis of representation and as entitled to separate courts; Michigan* organized it as a body corporate, whose economic interests comprised an organic unit. No county could have

* Michigan was settled chiefly from New England and New York.

fewer than sixteen townships, each six miles square, as surveyed by the United States, unless in pursuance of law, and with the consent of a majority of the electors residing in the county. The Legislature might organize any city into a separate county when it attained a population of twenty thousand inhabitants, without reference to its geographical extent, if a majority of the electors of the county in which the city was situated favored separate organization. In each county the electors chose biennially a sheriff, a county clerk, a county treasurer, a register of deeds, and a prosecuting attorney. The sheriff, the county clerk, the county treasurer, the judge of probate, and the register of deeds were required to have their offices at the county seat. As was customary in other States, the sheriff was incapable of succeeding himself in office, and was required to give security for the performance of his duties. The county could not be made responsible for his acts. The county board of supervisors consisted of one from each township. The representation of cities in the board of supervisors was left to be regulated by the Legislature. The county seat, when established, could not be removed until the place to which it was proposed to be removed had been designated by two-thirds of the board of supervisors of the county, and the proposed location had received the approval of a majority of the county electors. The board of supervisors might by taxation raise or borrow one thousand dollars for the purpose of constructing or repairing public build-

ings, highways, or bridges, but no greater sum unless authorized by a majority of the electors of the county. This board also, under the restrictions of law, was empowered to lay out highways, construct bridges, and organize townships.

Michigan was the first State to introduce a specific article on township.* It provided for the annual election in each township of a supervisor and a clerk (who was *ex officio* a school inspector), a commissioner of highways, a township treasurer, a school inspector, an overseer of highways for each district, and not more than four constables. Each organized township was made a body corporate. The interests of local government were also recognized in the provisions on public education, finance, taxation, and corporations.

The three new constitutions of 1851 were less complete respecting local government than that of Michigan. In Indiana the interests of local government were principally conserved by a long list of limitations forbidding special legislation. There was no article on counties or townships, but the article on the administrative in part supplied this defect by providing for the election in each county of a clerk of the circuit court, of an auditor, a recorder, a treasurer, a sheriff, a coroner, and a surveyor. An innovation was introduced by limiting the choice of county officers to persons who were electors of the county. The article on taxation, as in other States, also affected local government. If

* Constitution of 1850, Art. xi.

any county failed to demand its proportion of the interest upon the common-school fund, it should be reinvested for the benefit of the county. The several counties of the State were held liable for the preservation of as much of the fund as was intrusted to them, and for the payment of its annual interest. The county boards were empowered to provide farms as asylums for persons who, by reason of age, infirmity, or other misfortune, had claims upon the sympathies and aid of society.* As in other States, no county could subscribe for stock in any incorporated company unless the stock were paid up at the time of subscription, nor loan its credit, nor borrow money for the purpose of taking such stock. It is in this constitution that a new provision, of far-reaching consequences, and destined to general adoption, appeared — that the General Assembly should never on behalf of the State assume the debts of any county, city, town, or township, or of any corporation.

Maryland, though providing in its constitution at this time for new counties, made no reference to county government, following the Southern precedent of restricting its provisions merely to the apportionment of representation and the qualifications of the electors.

Ohio introduced an article on county and township organization. The Assembly should provide by law for the election of necessary county and township officers. As in Tennessee, the local elec-

* In Art. ix. on State institutions.

tions should be on a different day from that of the general elections. Township officers could be elected and commissioned for but one year. The commissioners of counties, the trustees of townships, and similar boards were given the power of local taxation for police purposes. The elaborate provision respecting apportionment made this constitution unique in our civil history.

During this half-century, the principal change in the judiciary was from the appointive system for life to the elective system for a term of years. Georgia,* by constitutional amendment, initiated this change in 1818, but after seventeen years abandoned popular election for one by the Legislature. In the apportionment of a State for judicial purposes, the ratio was the amount of litigation. Not satisfied with the abolition of the life tenure, six States retired their judges at sixty, sixty-five, and seventy. Though Georgia abandoned election by the people for a while, other States adopted it, and by 1850 the commonwealths were about evenly divided between the elective and the appointive systems. The division was not sectional. For twenty-five years New York elected the judges of its highest courts for a period that lasted during good behavior, but after 1846 for a

* The Georgia convention of 1839, called to amend the constitution of 1798, assembled at Milledgeville, May 6 to 16, and consisted of three hundred members. R. M. Charlton, J. McBerrien, and J. P. King became United States Senators; eight members served in Congress, among them Alexander H. Stephens. He became Vice-President of the Confederate States of America (1861-1865). See the journal for full list of members.

term of eight years. The term in other States varied from five to fifteen years. Thus, during the half-century, three methods of securing a judiciary were in use—appointment by the Governor, election by the Legislature, and election by the voters. The last did not become the characteristic method until after 1840.*

Demands for changes in the judiciary were a constant excuse for new constitutions.† The debates on this subject in the Kentucky convention of 1849 may be said to be typical of those in other States. The people did not take a keen interest in judicial reorganizations, and were quite content to leave the system to be worked out by the lawyers. It cannot be said that the change to the elective system satisfied the court or the bar. It was incident to the grand transformation going on in other departments. Democracy, sooner or later, was bound to reject the appointive system. Every official, high or low, must be chosen by popular vote. As the phrase went—in many joint resolutions of Legislatures and political conventions—

* The Vermont constitutional amendments of 1850 (Montpelier, January 2 to 14) were the work of two hundred and forty-two delegates, acting on the suggestions of the Council of Censors, in their report of February 28, 1849. Of the delegates, Carlos Coolidge was Governor (1849–1850). Two served in Congress. The amendments established elective offices, judicial and administrative, and regulated Senatorial apportionments. See the journal for names of delegates.

† See on the relative merits of appointive and elective judicial systems, Journal of Vermont Council of Censors (1841–1842), pp. 21, 22, 48, and 84; Journal of Wisconsin Convention of 1847, p. 106; and Debates in Louisiana Convention, 1845, pp. 750, *et seq.*

the appointive system " was contrary to the spirit of American institutions." Democracy did not stop long to discuss the merits of the two systems. Office-holding for life must be abolished— for the benefit of office-seekers.

Judges of the higher courts were always men learned in the law — that is, persons admitted to the bar. Though a man might be chosen at twenty-five, as in Wisconsin, he was more likely to be twice as old before he became a candidate. Perhaps English wigs and gowns are responsible for the tradition in America that judges should be old men. America has rudely shattered the tradition.

The inferior courts were too various in number, organization, and jurisdiction to permit an easy classification. The terms " circuit " and " district " were used somewhat synonymously, and in States in which the circuit system prevailed the court usually was held in the several circuits, as in the federal system, by the members of the supreme court. Not as yet did the amount of judicial business commonly require a resident circuit judge, but with the settlement of the country the judicial systems were gradually amended by providing for such an officer, as well as for a subdivision of the circuits into districts. These districts were determined at first by the Legislature, but as the custom of districting became firmly established, the constitutions gradually came to prescribe the minimum number of counties which should compose a district. The unit of measure in districting was,

of course, the amount of judicial business, as in Pennsylvania, so that it was almost impossible long to preserve economic equities among the districts. Therefore, a redistricting of the State for judicial purposes was usually the first piece of work demanded of a new Legislature. Frequently this was made a political issue; and, again, the districting itself was sometimes determined by partisan influence. The bench early became a place of political reward, and both the national and commonwealth party debts were paid in judicial appointments. If no vacancy existed at the time, the old court might be enlarged or a new court or new districts be created.

Judicial salaries were usually too low to attract the ablest lawyers of the country, and, excepting the judges of the supreme court, members of the judiciary were usually men of ordinary ability. The reports in any State, from 1800 to 1850, disclose the judicial ability of those who made them. In the newer States especially, the judges were rarely men of extraordinary attainments. The somewhat hasty adoption of the elective system, the short term of office, the low salary, and the fatigues of the circuit system practically excluded the ablest lawyers from the bench. The history of the American bar is more brilliant than the history of the American bench. The many great lawyers who appeared in the lower courts during this time gave the bar an intellectual equipment of which the bench was too frequently sadly in need. As yet, legal precedents, except the English, were few, and there

was a most unreasonable prejudice against the citation of English decisions. Some of the States, like Kentucky, enacted laws forbidding the citation of an English case. This was usually circumvented by the lawyers. They inserted the citations in their briefs and the court read them. An American judge was often compelled to fall back on his instincts. The law reports of the older States, particularly of Massachusetts,* New York, Pennsylvania,† Virginia,‡ and South Carolina,

* The Massachusetts convention of 1820 (Boston, November 15, 1820, to January 9, 1821) consisted of four hundred and eighty-six members. John Adams, the most distinguished of its members, was unanimously chosen its president, and declined on account of age, but participated in the discussions. Levi Lincoln was Governor of the State (1825–1834); Joseph Story was appointed to the United States supreme court (1811), and served thirty-four years, becoming the founder of our admiralty jurisprudence, and one of the authoritative expositors of the principles of constitutional government. Three members became United States Senators—Daniel Webster, R. Rantoul, and J. B. Varnum; sixteen became members of Congress, among them Story, Josiah Quincy, and Levi Lincoln; five served as Presidential Electors—John Adams (1821), Webster (1821), Lincoln (1825–1849), E. Mattoon (1821–1833), L. Saltonstall (1837); all of these served in Congress; Chief Justice Parker presided; J. B. Varnum was Speaker of the Tenth and Eleventh Congresses. See the proceedings for list of delegates.

† The Pennsylvania constitution of 1838 (Harrisburg, May 2, 1837; Philadelphia, February 22, 1838) was the work of one hundred and thirty-three delegates. James Pollock served as Governor (1855–1858); twenty-three served in Congress, among them Thaddeus Stevens, C. J. Ingersoll, John Sergeant, James Pollock, and Joseph Hopkinson; Hopkinson became United States District Judge; H. Sheetz served as Presidential Elector (1829–1833); J. B. Sterigere (1837), T. P. Cope (1841), T. H. Sill, S. A. Purriance (1849), J. Pollock (1861), Daniel Agnew, and G. W. Woodward became chief justices of the State. The list of members is given in the journals (2 vols).

‡ The Virginia constitution of 1829–1830 (Richmond, October

supplied the Western courts with guides. Parsons and Kent, Gibson, Wythe, and Rutledge, were no less influential in new States than in their own. Legal decisions, like population, followed isothermal lines, and it was unusual for a citation from a Southern judge to be heard in a State north of the river Ohio, or of a Northern judge in one south of it. In border State courts only were citations freely made from both Northern and Southern reports.

5, 1829, to January 15, 1830) was made by ninety-six delegates. Among them were ex-Presidents James Madison and James Monroe; John Tyler, afterwards Vice-President and President of the United States; John Marshall, Chief Justice of the United States; A. P. Upshur, Secretary of Navy (1841–1843), and of State, (1843–1844); J. Y. Mason, Attorney-General of the United States (1845–1846), Secretary of Navy (1846–1849). Four served as Governors—James Monroe (1799–1802, 1812–1814), John Tyler (1825–1827), W. B. Giles (1827–1830), L. W. Tazewell (1834–1836). Giles, Monroe, Tyler, Tazewell, John Randolph, and B. W. Leigh served in the United States Senate. Twenty-three were members of Congress, among them Madison, Marshall, Upshur, Randolph, and P. P. Barbour (the latter Speaker of the Seventeenth Congress). Six served as Presidential Electors—J. Taliaferro (1821, also member of Congress), A. Stuart (1821–1837, 1841–1845), H. L. Opie (1833–1837), R. Logan (1841), W. P. Taylor (1845), J. S. Barbour (1849, also member of Congress); John Y. Mason was appointed United States District Judge. Madison was a member of the Federal Convention of 1787, and has been called "The father of the Constitution." Marshall was a member of the Virginia ratifying convention of 1788. The Virginia constitution of 1829–1830 became a precedent for all later constitutions of the Southern States down to 1860. Its debates were of a high order, and remain an authoritative exposition of the principles of American government as understood at the time in the South. For list of members, see journal of the convention.

CHAPTER XV

THE COURTS. THE PEOPLE. SOCIAL AND CIVIL PROGRESS

THE institution of the federal courts by the judiciary act of 1789 proved regulative of the whole course of American judicial affairs. The eminent judges early called into the supreme court of the United States handed down decisions that were cited in all parts of the country. The federal judicial system thus tended constantly to correct judicial aberrations in the States, and also to check those disintegrating influences in the commonwealth courts which tended to make them sectional, as courts of the North and courts of the South. If it had not been for this paramount regulative influence, it is improbable that the American Union could have continued two generations. It should not be forgotten that during this half-century there were frequent contests between the federal and the State courts, of which that in Ohio, in 1821, was a type. But the half-century did not pass before the supreme authority of the national courts began to be realized.

To the mind of one man this national triumph was chiefly due. John Marshall, for thirty-five years of this half-century, by a series of great opin-

ions definitive of the national idea, regulated the course of judicial decisions in all the commonwealths. If one American were to be named by whose labors American nationality was largely established, I should unhesitatingly name Marshall. The victories of Washington, the logic of Hamilton, the eloquence of Webster, the subtle distinctions of Calhoun, the popularity of Clay never exercised so powerful, so beneficent an influence as the decisions of Chief Justice Marshall. We were the first people to create a distinct judicial court of final authority and to abide by its decisions, and early in our career one of the greatest of judges was at the head of the national system.

During the half-century the disintegrating forces in America often seemed more powerful than those working to form a more perfect union. State pride—the passing claim to commonwealth sovereignty—and slaveocracy, North and South, found frequent formulation in State constitutions, and more frequent in State laws. But while these laws and these constitutions seem to express the course of American political thought, there was a greater power, though at times unseen, which was determining it—the national idea—the supreme court of the United States.

The highest courts of the commonwealths during this period may be said to have been less democratic than the inferior ones. As Jeffersonian ideas gradually overspread the land, the county and district courts slowly responded, and at the same time displayed the forces which were contest-

ing for supremacy. The county courts, having a limited jurisdiction, were merely the highway to the courts of last resort. Though the judges presiding in them were usually elected by the people of the county, they were not infrequently influenced by strong political prejudices. Thus Federalism in New England was as strong in the courts as in the Legislature, and indeed held possession of the courts long after it had lost control of the Legislature. In the slave-holding States, the county and district courts more closely reflected public opinion than did the higher courts. Slavery and all its allied powers were supported nowhere more earnestly than in the inferior courts of the slave-holding commonwealths. On the other hand, slavery and its allied powers were nowhere more boldly attacked than in the lower courts of the free States. The inferior courts, though they were technically courts of record, did not publish their decisions. But from the briefs of counsel in cases coming up on appeal or by writ of error, printed somewhat at length in the reports of the supreme court, there is preserved a record of the intellectual temperature of the lower courts as affected by the great political issues of this period. The case of Dred Scott, although settled in the early years of the second half of the century, was typical of innumerable cases of a political nature which arose in the inferior courts during the first half.

In the organization of the inferior courts from 1800 to 1850, substantially the same regulations were adopted as for the superior. In States pro-

viding for the retirement of judges at a certain age, the age limit applied to all the courts. Judges of the inferior courts were not always required to be men learned in the law. Moreover, they were chosen by the elective rather than by the appointive system. The many amendments that were made to the constitutions of the period affecting the judiciary quite preclude any general statement, but it may be said that in the organization of the inferior courts the appointive system was more speedily abandoned than in that of the supreme courts. This was to be expected. American democracy would write its first judicial changes in the organization of district and county courts. Local ambition would find an easier success in the county or district than in the State. Rotation in office would be demanded in the county court long before it was demanded in the supreme court. Nor was the public unwilling to believe that the county judge need not be so learned and so experienced as the judge of the supreme court. The changes in the inferior courts during the period were, therefore, chiefly in the transition from the appointive to the elective system; from long to short terms; in a gradual specialization of the functions of inferior courts; and, particularly, in constitutional or statutory provisions, fixing the jurisdiction of the court by naming the amount of money involved in controversy which should measure its authority. This amount was fixed by California, at the close of the period, at two hundred dollars, a sum that may be considered as its typical monetary limit.

Another struggle was going on of which traces may be found in the fundamental laws. With the gradual recognition of the autonomy of local interests and the importance of local government, the people of the county gradually demanded that the county courts should have larger jurisdiction. There was an increasing unwillingness that cases should be settled far from the place in which they arose, so that in almost every commonwealth there sprang up a contest between the advocates of a limited and of a large jurisdiction of the inferior courts. The old distinction between law and equity rapidly broke down in America, so that when new States or new courts were organized, it became common to grant the court equal equity and law powers. This merger kept pace with changes in practice, with the abolition of special pleadings, and with the gradually increasing uniformity of procedure, not only in the same State, but in groups of States. This uniformity was produced in large measure through the influence of migration. At the time of organizing government in a new State it will be found that the members of the convention, as in California, came from many States and were accustomed to various rules of court. A compromise in the organization of the judiciary and in adopting rules of court naturally followed, and the most conservative of professions gradually simplified the practice under the common law, and by statutory provision imparted a more uniform character to the legal method of the country. The older States re-

sponded more slowly to the change, and the common-law practice continued in Pennsylvania, New Jersey, North Carolina, and Illinois long after it had practically merged into a practice under the statute in more than half the commonwealths.

The organization and the jurisdiction of the inferior courts are the more difficult to describe, because they were usually left by the constitution to be determined by law. As this was frequently changed, it is only by a technical examination of the statutes that this organization and jurisdiction can at any time be known. There were some statutory changes which show the general course of judicial affairs in the States during this time. The terms of the courts were regulated by law, a reform which had been demanded in the eighteenth century. Judges no longer received fees, but were paid regular salaries, prescribed in the constitution or by law. The laws and judicial decisions were published from time to time, and court reports were free to be published by any person. Thus the public was given easy access to the decisions of the courts.

It was a period of over-legislation and of a multitude of law reports. The almost paradoxical increase of laws and judicial decisions made it necessary to establish law libraries for the use of lawyers and judges. These were begun usually at the capital of the State, and later at the principal county seats. But the best law libraries were found in the large cities of Eastern States. The incompatibility of office was more carefully defined

by law than before, and the judges of the courts were made ineligible to hold any other office while exercising their judicial duties.

With the extension of the functions of the jury, making it judge both of the law and the fact, there was a relative limitation of the authority of the judges: they were forbidden to charge the jury as to the facts, and were empowered only to review the testimony and state the law. The style of judicial process was, "In the name of the people of the State."

The subordinate offices of the court continued as in the preceding century, but gradually became elective—the clerk of the district court being chosen by the district electors, the clerk of the county court by the electors of the county. The mayor's court was never popular nor freely established. With the increase of population and the growth of cities, the courts in counties in which there were large cities gradually became differentiated—as in Boston, New York, and Philadelphia; but the differentiation consisted only in the reorganization as separate courts of the former functions of the court, as a court of probate, or orphans' court; as a court of oyer and terminer, or a criminal court; as a court of common pleas, or civil court. Outside of large cities, however, the county court consisted, with rare exceptions, in the most populous counties, of but one judge, who exercised all these functions. Gradually, in county courts having but one judge, these functions were separately recognized by providing for different ses-

sions of the court, as a court of probate, a criminal court, or a common pleas court. For each court there was provided, either by the constitution or the statute, an attorney who represented, *ex officio*, the people of the commonwealth. This attorney was the State attorney, the district attorney, or the county attorney, and his office gradually became elective. The salary of the office was low, and in consequence it was usually filled, except that of State attorney, by young lawyers, and was considered a stepping-stone to political preferment. It afforded the incumbent every opportunity for becoming personally acquainted with the electors; and that this opportunity was not wasted is evident from the history of the great number of our public men whose careers began as district or county attorneys.

In Maryland there arose a great contention over the office of attorney general, and in the constitution of 1851* it was provided that no law should be passed creating the office. Instead, the duties of the office were distributed by the creation of the office of State's attorney, which was to be filled by popular election in each county, and in the city of Baltimore.

The changes in the offices of sheriff and coroner

* The Maryland constitution of 1850–1851 (Annapolis, November 4, 1850, to May 13, 1851) was the work of one hundred and four delegates. Two served as Governors—S. Sprigg (1819–1822) and T. H. Hicks (1858–1862). Hicks, D. Stewart, and W. D. Merrick served as United States Senators; sixteen members served in Congress. J. B. Ricaud was a Presidential Elector in 1845, and C. J. M. Gwinne in 1853. See list of delegates in the Debates.

were from appointment to popular election.* Similar changes affected the office of justice of the peace, the humble office which is at the foundation of our judicial system. In the eighteenth century it was filled by appointment. In all the States the judges of the supreme court, and in some the judges of the circuit, district, or county court, were *ex-officio* justices of the peace. The extension of the jurisdiction of the county courts greatly affected the jurisdiction of justices of the peace and magistrates. Comparatively, their office was of greater importance in the Southern than in the Northern States, and in no State did it rank higher than in Virginia, where, by the constitution of 1850, the justices of the peace comprised the judges of the county. In the North, during this half-century, the changes affecting the justices were chiefly in the regulation of their final jurisdiction, which was gradually extended. In the eighteenth century the final jurisdiction of the justice of the peace in civil cases was usually in controversies in which the amount involved was not more than one pound; but before the half-century closed this was greatly changed. Georgia, by amendment in 1812, made it thirty dollars. Mississippi, in 1817,† made it fifty, and readopted

* See Journal of Vermont Council of Censors (1841–1842), p. 21, *et seq.*

† The Mississippi constitution of 1817 (Washington, July 7 to August 15) was the work of forty-seven men. Five became Governors of the State—D. Holmes (1817-1819, 1825–1827), G. Poindexter (1819–1821), W. Leake (1821–1825), J. J. McRae (1854–1858), Poindexter had served as Territorial judge; Leake became United

the provision in 1832. Alabama adopted the same provision in 1819.* Louisiana, in 1845,† raised the jurisdiction to one hundred dollars; and Iowa, in 1846, and Michigan, in 1850, gave the justices exclusive jurisdiction in cases involving one hundred dollars. Michigan gave concurrent jurisdiction with the county court in cases involving from three to five hundred dollars. Speaking generally, the jurisdiction of this court during this period was greatly increased, a change caused by the general demand of the people that litigation should be determined speedily, cheaply, and for the convenience of the parties in the place where the controversy arose. Like other offices during the period, the justice's tended to become elective, but the method of filling it was not uniform.

States district judge. Leake, Holmes, Poindexter, and McRae became United States Senators; Rankin, Lattimore, and Dickson, members of Congress; Patton, Presidential Elector (1825). The list of delegates was obtained from the Secretary of State for Mississippi.

* The Alabama constitution of 1819 (Huntsville, August 2) was made by forty-four delegates. Four became Governors—Thomas Bibb (1820–1821), J. Murphy (1825–1829), G. Moore (1829–1831), C. C. Clay (1835–1837). W. R. King was Vice-President of the United States (1852–1856), and United States Senator (1819–1844); Clay and J. W. Walker became United States Senators; Chambers, Moore, Murphy, and J. Pickens served in Congress; six became Presidential Electors—H. Minor, G. Phillips (1821); R. Safford, H. Chambers, J. Murphy (1825), T. D. Crabb (1829). Murphy was also a Presidential Elector in 1849. The list of delegates was obtained from the Secretary of State for Alabama.

† The Louisiana constitution of 1845 (New Orleans, January 17 to May 16) was made by seventy-seven delegates. Of these, three served as Governors — W. C. C. Claiborne (1804–1816), A. B. Roman (1830–1834), Joseph Walker (1850–1854); Claiborne and Judah P. Benjamin became United States Senators, and Benja-

In the new States the justices of the peace were elected, as in Ohio,* Indiana,† Arkansas,‡ Michigan,§ and Illinois;‖ but in the older States they were usually appointed by the Governor. In Tennessee¶ they were elected by the joint ballot of the Legislature. The term of the office was from three to six years, and the incumbent was re-eligible. The number of justices in a county depended not only upon its population, but upon the character of its local government. In States organized upon the township basis, there were usually two justices for each township; in States organized upon the county basis the number was regulated by population. The compensation of justices was derived wholly from fees, but the judges were paid fixed salaries. In the aggregate, larger salaries were paid to the judges than to the Governors. The highest judicial salary fixed by a constitution of the period was in Louisiana,** its chief justice receiving six thousand dollars, its associate justices five thousand five hundred, its county judges two thousand five hundred—an increase of the salary of the chief justice of one thousand over the amount fixed by the first constitution of the State.†† A typical salary of the time in the South was fixed by the constitution of Virginia of

min Secretary of War of the Confederate States of America. Five members served in the Congress of the United States. Benjamin was a Presidential Elector in 1849; T. W. Scott in 1829, 1833, 1837, and 1841. See list of members in either edition of the Debates.

* 1802, 1851. † 1816, 1851. ‡ 1836. § 1837, 1850.
‖ 1848. ¶ 1834. ** 1845. †† 1812.

1850, by which a judge of the supreme court was to receive not less than three thousand dollars, and one of the inferior court not less than two thousand. At the same time Michigan fixed the salary of its circuit-court judges at one thousand five hundred dollars, which was slightly below the salary usually paid in the North. Judicial salaries were highest in the South. Here, with few exceptions, were found the ablest judges and the best lawyers. The brilliancy of the Southern bar shines with continuous lustre during this period. Here, too, leisure and culture met and were generously supported by the prevailing social and industrial systems. It was a brilliancy that shone not only in the courts, but in the halls of legislation. It illuminated the fierce debates in Congress.

At the North, although there was less learning at the bar, yet there was a larger practice. Economic conditions there tended to foster the eloquence of abbreviated speech. In Kentucky, most of the white men of the county gathered at the court-houses to hear the lawyers discuss an exciting case; in New York, the people were too seriously engaged in working their farms, in attending their stores, or in managing their factories, to spend their time in listening to the trial of causes. The legal profession was less influential in the North than in the South. If the Southern lawyer was famed for eloquence, his Northern brother was equally famed for counsel—the industrial activity and the diversified interests of the people of the North affording cases at law which

required not merely profound legal learning, but also a wide practical knowledge of affairs. The highest type of the Southern lawyer was Pinkney; that of the Northern, Webster.

Religious and property qualifications for office and for electors were quite abandoned before 1850.

QUALIFICATIONS OF ELECTORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TAXATION	REMARKS
Ohio	1802	21	State, 1 yr....	....	State or co.	Votes in co. or dist. of res.
"	1851	"	State, 1 yr., and in co., dist., or ward, as by law.	....	....	[1] Non-voters — that is, persons in U. S. marine, naval, or military service, and idiots or insane.
La.	1812	"	Co., 1 yr.	Freeholder from U. S. If he has paid State tax.	Paid State tax within 6 mos.	....
"	1845	"	State, 2 yrs.; last yr. in parish.	....	....	[1] As in Ohio.
Ind.	1816	"	U. S. citizen, 2 yrs.; State, 1 yr.	....	....	[1] As in Ohio.
"	1851	"	State, 6 mos.; if of foreign birth, in U. S. 1 yr., State 6 mos., and declared intention to become citizen.	....	....	[1] As in Ohio; also exclusion of negroes and mulattoes; also of duellists, etc. (Art. ii.)
Miss.	1817	"	U. S. citizen; State, 1 yr.; co., 6 mos.	....	Or pd. State or co. tax or served in militia, unless exempt.	Votes in co. or dist., as in Ohio, 1802.

QUALIFICATIONS OF ELECTORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Continued.*

State	Const.	Age	Residence	Property	Taxation	Remarks
Miss.	1832	21	U. S. citizen; State, 1 yr.; co., city, or town, 4 mos.	....	....	Retains right to vote if he removes within the State.
Conn.	1818	"	Town, 6 mos.	Freehold worth $7 a year.	Or paid State tax within a year.	Or enrolled in the militia.
Ill.	1818	"	State, 6 mos.	....	....	Votes in co. or dist. of res.
"	1848	"	State, 1 yr...	....	....	Votes in co. or dist. of res.
Ala.	1819	"	U. S. citizen; State, 1 yr.; co., city, or town, 3 mos.	....	....	Votes in co. or dist. of res.; also [1] as in Ohio.
Mass.	1820 am'd't	"	State, 1 yr.; district, 6 mos.	....	Paid co. tax.	....
Me.	1820	"	State, 3 mos.	....	....	Paupers, wards, and Indians not taxed, excluded.
Mo.	1820	"	State, 1 yr.; co. or dist., 3 mos.	....	....	[1] As in Ohio.
N.Y.	1821	"	State, 1 yr., co. or town, 6 mos.	$250 for persons of color.	Or pd. State or co. tax within a year.	Or road or militia service. (Art. ii.)
"	1846	"	Citizen 10 days; inhab. State 1 yr.; co., 4 mos.	Property qualification for whites abolished in 1845.	....	Equal suffrage to colored persons rejected, 1846; vote of 85,306 to 223,834. (Hough.)
Ver.	1828 am'd't	"	As in 1793...	As in 1793.	As in 1793.	Freeman; native-born or naturalized.
Va.	1830	"	See Const., Art. iii., Sec. 14.	See Const., Art. iii., Sec. 14.	See Const., Art. iii., Sec. 14.	Art. iii. was a complicated compromise.
"	1850	"	State, 2 yrs.; dist., 12 mos.	....	....	[1] As in Ohio.

QUALIFICATIONS OF ELECTORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Continued.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TAXATION	REMARKS
Del.*	1831	21 or 22	State, 1 yr.; dist., 1 mo.	....	Vote "on age"; otherwise on payment of State or co. tax.	[1] As in Ohio.
Tenn.	1834	21	U. S. citizen; co., 6 mos.	....	....	A negro who could give testimony against a white man; a "competent witness in a court of justice" could vote. See note, p. 396.
N. C.	1835 am'd't	"	State, 12 mos.	50 acres of land for 6 mos. before election.	....	....
Mich.	1835	"	State, 6 mos.	....	....	[1] As in Ohio.
"	1850	"	State, 2 yrs. and 6 mos.; or on declaration of intention to become citizen, State, 3 mos., ward or tp. 10 ds.	....	....	[1] As in Ohio. Every civilized male of Indian descent not a member of any tribe.
Ark.	1836	"	U. S. citizen; State, 6 mos.	....	....	[1] As in Ohio.
Pa.	1838	"	State, 1 yr.; dist., 10 days.	....	Paid State or co. tax within 2 yrs., or vote "on age."	....
R. I.	1842	"	See Art. ii., Secs. 1, 2.	See Art. ii., Secs. 1, 2.	See Art. ii., Secs. 1, 2.	The article on the suffrage is almost as complicated as that of Va. in 1830.

* Religious tests abolished.

QUALIFICATIONS OF ELECTORS AS PRESCRIBED BY THE STATE CONSTITUTIONS, 1800–1850.—*Concluded.*

STATE	CONST.	AGE	RESIDENCE	PROPERTY	TAXATION	REMARKS
N. J.	1844	21	State, 1 yr.; co., 5 mos.	....	....	[1] As in Ohio.
Fla.	1845	"	U. S. citizen; State, 2 yrs.; co., 6 mos.	....	....	If not exempted from militia service.
Iowa.	1846	"	State, 6 mos.; co., 60 days.	....	....	[1] As in Ohio.
Wis.	1848	"	State, 1 yr...	....	....	The right to vote included whites, negroes, and Indians. See Art. iii., Sec. 1. This was the most liberal constitution made (in this respect) from 1800 to 1850.
Ky.	1850	"	State, 2 yrs.; dist., 1 yr.; precinct, 60 days.	....	....	....
Cal.	1850	"	State, 6 mos.; dist. 30 ds.	....	....	[1] As in Ohio.
Md.	1851	"	State, 1 yr.; co., 6 mos.	....	....	Special clause against bribery in elections.

NOTE.—All the above constitutions required that the elector should be of the male sex; and with the exception of Maine, New York, Rhode Island, and Wisconsin, he should be of the white race.

The religious qualifications disappeared earlier than those of property.* Democracy tends to a

*See the Debates in the New Hampshire convention of 1850–1851, already cited. The convention submitted amendments to the constitution of 1792, abolishing religious and property qualifications; the first was rejected, the second ratified. The vote was a striking exception to the result elsewhere in the country. The amendments were the work of two hundred and eighty-five delegates. Franklin Pierce presided. Levi Woodbury was Gov-

multiplicity of sects, and religious qualifications for political purposes cannot be maintained amid their contentions. The elimination of the property qualification was by easy stages. At first the constitutional requirement of land or personal property was interpreted literally, but alleviation came at the hands of the General Assemblies. Several fixed the payment of taxes as the equivalent of property, or taxes and residence. Jeffersonian democracy made the abolition of religious and property qualifications an article of its creed, and succeeded in abolishing them. It was this party that enfranchised the white man. New York was the only State that made the free negro a voter by a provision of the constitution. It was an epoch-making innovation. Rhode Island, in 1842, introduced a registration clause, which

ernor of the State (1823–1824), United States Senator (1841–1847), Secretary of the Navy under Jackson, and of the Treasury under Van Buren. James Bell served in the United States Senate; G. Marston was a member of Congress. The occupations of the members were as follows: 157 farmers, 30 lawyers, 28 merchants, 7 physicians, 6 clergymen, 5 manufacturers, 6 carpenters, 2 teachers, 5 mechanics, 2 bankers, 3 printers, 2 brickmakers, 2 cordwainers, 1 machinist, 1 camphor-refiner, 1 miller, 1 register of probate, 1 deputy sheriff, 1 wool dealer, 1 blacksmith, 1 millwright, 1 boarding-house keeper. See Rules of the Constitutional Convention of the State of New Hampshire with a List of its Officers and Members, their Places of Residence, Occupations, Ages, and Boarding-places, and the Number of their seats; to which are added the Constitution of New Hampshire and the Constitution of the United States. By order of the convention. Concord: Butterfield & Hill, State printers, 1850. A manuscript copy of this rare pamphlet was lent to me by Hon. A. S. Batchellor, editor of the New Hampshire State papers. I am indebted to him for much material on the history of the State.

action was followed by Florida in 1845 and by Virginia in 1850. The new States uniformly required the voter to be a citizen of the United States as well as of the State,* but the time of local residence required gradually fell from two years to six months—incident to the desire of the several States to encourage immigration. This is well illustrated in the debates on the subject in the Michigan convention of 1850. The list of those excluded from the suffrage became somewhat longer. Agitation for woman suffrage began about 1845 in New York, and extended into Ohio

* The Vermont convention of June 26–28, 1828, assembled at Montpelier and consisted of two hundred and twenty-nine members. It adopted one amendment proposed by the Council of Censors of the previous year. (See Journal of the Council of Censors at their sessions at Montpelier and Burlington, in June, October, and November, 1827, published by order of council. Printed by E. P. Walton, Montpelier, Vt., 1828, pp. 37. It proposed three articles: The first, providing for a House of Representatives and a Senate; the second, giving the veto power to the Governor; and the third (which was adopted by the convention of June 27, 1828), providing that "no person, who is not already a freeman of this State, shall be entitled to exercise the privileges of a freeman, unless he be a natural born citizen of this or some one of the United States, or until he shall have been naturalized agreeably to the acts of Congress.") This was the first amendment to the constitution of 1793. Samuel C. Crafts, Governor (1828–1831), was president of the convention. He was a member of the convention of 1793, Presidential Elector in 1841, and United States Senator (1841–1843). It is said of him that he filled every office in the gift of Vermont. Horace Everett, Henry Olin, and William Cahoon, served in Congress. Olin was a member of the constitutional conventions of 1814 and 1822, and served as Chief Justice and as Lieutenant-Governor of the State. Cahoon served as county judge, as State Councillor, and as Lieutenant-Governor (1820–1821); he was also a Presidential Elector in 1809. Noah Crittenden was a Presidential Elector in 1813.

and Massachusetts, but as yet it was hardly suffered to enter the stage of serious discussion. No woman's party was as yet organized as a political force. No delegate to a convention was the chosen advocate of the innovation. Wisconsin was the only commonwealth that gave Indians the right to vote; to obtain which privilege, they must have severed their tribal relations. Early in the century an election usually lasted for three days. The change to one day was not universal till 1850. With this change came the written ballot and the abandonment of the *viva-voce* vote. The ballot was characteristic of the North, the *viva-voce* vote of the South.* Reforms in the franchise followed the law of democracy—that persons, not things, must govern. During this half-century, our civil institutions were in a state of transition from things to persons.

Laws and constitutions throughout this period were made chiefly by native Americans. Down to the close of 1850, nearly two and a half millions† of foreigners came to the country. The adult males were not likely to be chosen to office; those under age were not likely to be candidates before they reached middle life. Few of them reached office until after the civil war. There was a free migration from the older States into the West, following isothermal lines, but deflected in its course by economic conditions—Indian hostilities,

* The merits of the two methods of voting were discussed at great length in the Virginia convention of 1829–1830.

† 2,456,715

social opportunities, and individual fancy. New England and the Middle States settled the Northwest; Virginia, the Carolinas, and the coast States the Southwest. A third migration from Kentucky, Tennessee, Missouri, and Arkansas settled Texas. Ohio and the States to the west were composite in their population, constitutions, customs, and laws. A few delegates of foreign birth appear in the conventions, and the number gradually increases as the years pass. After 1840, the foreign-born in the Northwest exercised great influence; their vote, if concentrated, might decide a local election.

Like the constitutions of the eighteenth century, these of the nineteenth were the work of a few men, some of whom were greatly distinguished in public life. Of that famed assembly that made the Constitution of the United States, James Madison and Rufus King, more than a generation later, were foremost in preparing new constitutions for their native States. Between 1776 and 1800, above seventeen hundred delegates were, in the aggregate, engaged in a similar service.* From 1800 to 1850 the number so engaged was more than twice as great.† Of these, more than half came from their farms to perform a special service, and then return; but associated with this body of the plain people were nearly as many from the learned professions.

* See Vol. i., pp. 137–139 and notes to Chap. iv.

† The aggregate number of delegates who served in constitutional conventions from 1800 to 1851 is 3865. This number is compiled from the official lists. It does not include conventions whose work was rejected by the people.

The lawyers outnumbered any other professional class. In New England—as the records of New Hampshire, Connecticut, Massachusetts, and Maine show—clergymen were freely chosen; but in other parts of the country a clergyman was excluded from candidacy by force of that public sentiment which excluded him from civil office. In the new States, engineers, surveyors, millers, innkeepers, conveyancers, and land agents formed an influential class, and were found in most of the conventions. Of the more than thirty-eight hundred men who worked out the supreme law of the commonwealths during these fifty years, nearly all, at some time in their lives, served in local offices; some were officially identified with the government of county or district; and yet others rendered services in the State Legislature, in the State courts, or as Governors. As a working, political assembly, these men knew the State by experience. They were qualified to pass judgment on its resources and needs, if not on its functions. Moreover, every man chosen was, to use James Monroe's phrase, "anchored to property." From the Declaration of Independence to the Compromise of 1850, the framers of our constitutions of government were conservatives.

But the aggregate civil experience of these men was not limited by State boundaries. Of the delegates chosen during the first half of the nineteenth century, one out of every ten, at some time, was a member of Congress; one out of every fifty served in the Senate of the United States—the number of

Senators being the same as that of Governors; one out of every thirty cast a vote as a Presidential Elector; and one out of every hundred sat as a federal judge. Twenty were cabinet ministers.*

* Thomas Jefferson, elected delegate to the Virginia constitutional convention of 1776; Secretary of State under Washington (1789–1793). John Marshall, member of Virginia ratifying convention of 1788 and of Virginia constitutional convention (1829-1830); Secretary of State under John Adams (1800–1801). James Madison, member of the federal convention (1787), of Virginia ratifying convention (1788), and of Virginia constitutional convention (1829–1830); Secretary of State (1801–1809) under Thomas Jefferson. James Monroe, member of the Virginia convention (1829–1830); Secretary of State under James Madison (1811–1813), and of War (1814). Martin Van Buren, member of the New York convention of 1821; Secretary of State under Andrew Jackson (1829-1831). Daniel Webster, member of the Massachusetts convention of 1820; Secretary of State under William H. Harrison, under John Tyler (1841–1843), and under Willard Fillmore (1850–1852). Abel P. Upshur, member of the Virginia convention of 1829–1830; Secretary of the Navy under John Tyler (1841 - 1843), and also Secretary of State under Tyler (1843–1844). John M. Clayton, member of the Delaware constitutional convention of 1831; Secretary of State under Zachary Taylor (1849). Alexander Hamilton, member of the federal convention (1787), and of New York ratifying convention (1788); Secretary of the Treasury under Washington (1789–1795). Albert Gallatin, member of the Pennsylvania constitutional convention of 1789; Secretary of the Treasury under Thomas Jefferson and James Madison (1805–1814). Levi Woodbury, member of the New Hampshire constitutional convention of 1850; Secretary of the Treasury under Andrew Jackson and Martin Van Buren (1834–1837), and Secretary of the Navy under Andrew Jackson (1831–1834). James Guthrie, member of the Kentucky constitutional convention of 1849; Secretary of the Treasury under Franklin Pierce (1853–1857). Mahlon Dickerson, member of the New Jersey constitutional convention of 1844; Secretary of the Navy under Andrew Jackson and Martin Van Buren (1834–1838). John Y. Mason, member of the Virginia convention of 1829–1830; Secretary of the Navy under John Tyler (1844–1845), and also under James K. Polk (1846–1849); Attorney-General under Polk (1845–1846). Robert McClelland,

Were their experience to extend no farther, it would be enough to convince us that the institutions of the country were safe in their hands. Thirteen Presidents and Vice-Presidents participated in the work. The services of Washington were wholly, and those of John Adams and James Madison partly, rendered in the eighteenth century. Andrew Jackson was a member of the Tennessee convention of 1796, and a tradition—not supported by history—declares that the State owes its name to him.* Forty years after Adams's great work — the Massachusetts constitution of 1780—was ratified by the people, he was the most eminent of the four hundred and sixty-eight men chosen to amend it, and was by a unanimous vote invited to preside over the convention. Forty-two years after the federal convention, James Madison was elected one of the ninety-six delegates to form a new constitution for Virginia. As in Massachusetts ten years before, an ex-President was unanimously called on to preside, but Mon-

president of the Michigan constitutional convention of 1850; Secretary of the Interior under Franklin Pierce (1853–1857). Jacob Collamer, member of the Vermont constitutional convention of 1836; Postmaster-General under Zachary Taylor (1849–1850). Edmund Randolph, member of the federal convention of 1787, and of the ratifying convention of Virginia (1788); Attorney-General under Washington (1789–1794). Theophilus Parsons, member of the Massachusetts constitutional convention of 1780; Attorney-General under John Adams (1801). Felix Grundy, member of the Kentucky constitutional convention of 1799; Attorney-General under Martin Van Buren (1838–1840). Edward Bates, member of the Missouri constitutional convention of 1820; Attorney-General under Abraham Lincoln (1861–1863).

* See Vol. i., p. 137, note.

roe's feeble health soon compelled him to resign the chair, though, like Adams, he took a prominent part in the debates. With Madison and Monroe sat John Tyler, the senior United States Senator from Virginia, and also one of her ex-Governors, who was destined within ten years to be elected Vice-President and to succeed to the Presidency of the United States. Over the Albany convention of 1801, called to amend the work of John Jay, a Vice-President of the United States presided—Aaron Burr. Among the ninety delegates was Daniel D. Tompkins, destined twice to be chosen Vice-President, serving with James Monroe through the eight years of political truce somewhat erroneously named "the era of good feeling." Tompkins was again chosen to aid in revising the constitution of his native State. In the convention of 1821, of which he was president, he was associated with the senior United States Senator from New York, who was to become Vice-President and President, and to be twice defeated for the Presidency—Martin Van Buren.

Prominent in the Alabama convention of 1819 was William R. King, who then entered upon a political career covering forty years, serving in Congress, in the Senate, as minister to France, and culminating in his election as Vice-President with Franklin Pierce in 1852. But this last honor came too late. While in a vain search for health, King took the oath of office in a foreign land, and died on the day after his arrival home, never having as-

sumed his high duties. His colleague, Pierce, presided over the New Hampshire convention of 1850, and bore a large part in the labor of that assembly to abolish religious and property tests in the State. At the same time Indiana, in convention, was framing a new organic law, and among the delegates sat two destined to perform distinguished public services in Congress and to be chosen to the Vice-Presidency—Schuyler Colfax, the colleague of Grant, and Thomas A. Hendricks, the colleague of Cleveland, in their first terms.

But the list is not yet exhausted. Among the delegates were others whose fame exceeds that of some of those who became Presidents or Vice-Presidents. In the Massachusetts convention of 1820 sat Joseph Story, the father of our admiralty jurisprudence, and Daniel Webster—one of whose speeches in the convention, on "the basis of government," was repeated by him a week later in the Plymouth Oration, and has long been recognized as an English classic. Rufus King, already famed for his services in the federal convention, twice the choice of his party for the Vice-Presidency and once for the Presidency, was a member of the New York convention of 1821, and conspicuous in his efforts to secure recognition of the rights of free persons of color—the provision for which in the new constitution gave it a unique place among the great civil enactments of the century. John Marshall shed the light of his genius on the work of the Virginia convention of 1829. One constitution of this period has been attributed

wholly to one man. John M. Clayton was the principal, if not the sole, author of the third constitution of Delaware, and his work stood—indeed was irremovable—for sixty-five years. James Kent, the American Blackstone, co-operated with King and Tompkins and Van Buren, with Nathan Sanford, Samuel Nelson, and Ambrose Spencer, in framing the New York constitution of 1821. With them served Henry Wheaton, whose name is associated with the reports issued from the United States supreme court during a period of fifteen years. To the Pennsylvania convention of 1838 belonged Thaddeus Stevens, whose fiery eloquence thirty years later hastened the impeachment of Andrew Johnson. The president of this convention, John Sergeant, had borne the Whig standard, with Henry Clay, seven years before, and with him had gone down in defeat before Jackson and Van Buren. To the Georgia convention of 1839 belonged Alexander H. Stephens, whose forty years of public life may be abbreviated in the minds of posterity to his four years as Vice-President of the Confederate States of America, and to the last ten years of his life in the Congress of the United States. Of delegates to these conventions, not fewer than twenty became members of the Confederate Congress. Of these, ex-President Tyler was the most conspicuous. The Confederate Secretary of War, Judah P. Benjamin, was an active member of the Louisiana convention of 1845. Two members of the New York convention of 1846 were nominated for the Presidency nearly

thirty years later—Charles O'Conor and Samuel J. Tilden. Their ideas of civil polity were imprinted on the third constitution of New York, and, as time has proved, also upon the constitutions of seven Western States.

The names of other men who served as delegates in these conventions are associated with great events in our national history. It was W. C. C. Claiborne, a member of the Louisiana convention of 1812, who, commissioned by President Jefferson, raised the American flag over the Louisiana country and took possession of it on behalf of the United States. With the name of Henry A. Wise, a member of the Virginia convention of 1850, are associated the opening scenes of that tragedy which, beginning with the entrance of John Brown at Harper's Ferry, continued through four years of civil war. An episode in that tragedy is suggested by the name of Thomas H. Hicks, a member of the Maryland convention of 1850, and Governor of the State at the time of the Baltimore riots. With the name of John Letcher, a colleague of Wise in the Virginia convention, is associated the history of his native State during the war, at which time he was Governor. Of many delegates who were soldiers in that war, two rose to distinction—S. A. Hurlbut, a member of the Illinois convention of 1847; and H. W. Halleck, a member of the Monterey convention of 1849. Jesse B. Thomas, author of the Missouri Compromise, was a member of the Illinois convention of 1818, and J. M. Palmer, nominated for the Presi-

dency by the Gold Democrats in 1896, was a member of the convention of this State in 1847. The services of these delegates—nearly four thousand in number during the first half of the nineteenth century—will be found to include local, State, and national movements of many sorts and kinds. Pursued to the end, the records of these men would tell the history of the century. Not one of these men—five thousand and more in number—who from 1776 to 1850 formulated constitutional government in America, was a law-giver like Solon or Draco. In a democracy the supreme law is the expression of a constituency—the will of the public, written as a formula of government. The agency by which it is obtained, like this constituency, is democratic.

The forces at work during this half-century are typically illustrated by the membership of some of the constitutional conventions. In the Maine convention of 1820, two hundred and twenty-five were natives of the State; forty-eight, of Massachusetts; sixteen, of New Hampshire; and one each of South Carolina, England, Ireland, and Wales. In the New York convention of 1821, sixty-six were natives of the State; thirty-two, of Connecticut; nine, of Massachusetts; seven, of New Jersey; five, of Rhode Island; two, of Pennsylvania; and one each of Maine, Vermont, Maryland, and Virginia. In the New York convention of 1846, seventy-five were natives of the State; twelve, of Connecticut; eleven, of Massachusetts; six, of Vermont; six, of New Hampshire; three, of Rhode Island; three, of

New Jersey; two, of Pennsylvania; one, of Maine; one of Maryland; and one of North Carolina. Three were natives of Ireland and one of Scotland. The paternal ancestry of seventy-seven was English; of thirteen, Irish; of nine, Scotch; of nine, German; of six, Welsh; of four, French; of five, Dutch; of one, Belgic; and of one, "Teneriffe," probably English. The maternal ancestry of sixty-two was English; of twenty-one, Irish; of fifteen, Scotch; of eight, German; of six, Dutch; of five, Welsh; of three, French; and of one, Canadian.

The union of ancestral stock (the paternal ancestor being first mentioned) was—English and English, fifty; Irish and Irish, eight; Scotch and Scotch, six; German and German, four; Dutch and Dutch, two; French and French, one; English and Irish, seven; English and Scotch, six; English and Welsh, five; English and German, three; English and French, two; English and Dutch, two; Irish and English, three; Irish and Scotch, one; Scotch and English, three; Scotch and German, one; Welsh and English, three; German and English, one; German and Scotch, one; German and Irish, two; German and Dutch, one; Dutch and English, two; Dutch and Scotch, one; French and English, one; French and Canadian, one; Belgic and Irish, one; "Teneriffe" and Scotch, one having the surname Cambrelling. Of pure Teutonic ancestry there were sixty-five; of pure Celtic, twenty-one; of the union of Teutonic and Celtic, twenty-six; of Celtic and

Teutonic, nine—thus making the racial influence chiefly Teutonic.

In the Wisconsin convention of 1847, twenty-five were natives of New York; nine, of Connecticut; seven, of Vermont; six, of Massachusetts; five, of Ireland; four, of Kentucky; three, of New Hampshire; two, of Pennsylvania; and one each of Maine, New Jersey, Maryland, Virginia, Ohio, Norway, Germany, and the Northwest Territory.

In the Kentucky convention of 1849, sixty-four delegates were natives of the State; nineteen, of Virginia; four each of North Carolina and Tennessee; three, of Maryland; one each of New Hampshire, Vermont, Pennsylvania, and South Carolina. The California convention of the same year enrolled eleven natives of New York; seven, of California; six, of Missouri; two each of Massachusetts, Virginia, Ohio; and one each of Maine, Connecticut, New Jersey, Pennsylvania, Illinois, Indiana, Kentucky, Oregon, Ireland, Scotland, France, and Switzerland.

Of the Michigan convention the list has already been given.* In the Ohio convention of 1850, thirty-one were natives of the State; twenty-seven, of Pennsylvania; eleven, of Connecticut; ten, of New York; eight, of Virginia; five, of Massachusetts; three each of Vermont and Kentucky; two each of New Hampshire, Delaware, Maryland, and England; one each of Georgia, Tennessee, Ireland, and the District of Columbia.

* Vol. ii., p. 184.

In the conventions of Wisconsin, Ohio, and Michigan there were two hundred and seventy-nine men, the native country of most of whom is known. Eighty-three were from New England; one hundred and fourteen from New York, Pennsylvania, and New Jersey; twenty-three from slave-holding States, and twenty-one foreign born. In the conventions of Wisconsin and Michigan there were four natives of the Northwest Territory; in the Michigan convention, one native of the State; and in that of Ohio, thirty-one native born. Thus, in these States the North was represented by two hundred and thirty-three delegates, the South by twenty-three. The foreign-born members affiliated with Northern sentiment. The three most influential Northern States were New York, Pennsylvania, and Massachusetts, whose relative influence in the three States was as seventy-eight, thirty-two, and twenty-four—the number of delegates who were natives from these commonwealths respectively.

The conventions which made the constitutions of Louisiana, Mississippi, Alabama, Arkansas, and Texas* were composed of Southern men, mostly natives of older States to the east. The constitutions of Louisiana, Mississippi, and Alabama

*The constitution of Texas of 1845 (Austin, July 4 to August 27) was framed by sixty-one delegates. Of these, G. T. Wood became Governor (1847–1849); T. J. Rusk, J. P. Henderson, and John Hemphill served in the United States Senate; L. D. Evans, G. W. Smyth, and V. E. Howard in Congress. Smyth and Evans were Presidential Electors in 1853. See Vol. i., p. 344, note. See the journal for the membership of the convention.

showed the immediate influence of Georgia and the Carolinas; the constitution of Arkansas, like the first of Louisiana, was largely a transcript of the second constitution of Kentucky. Texas followed precedents already established in the four States to the east, and Florida quite closely copied from the constitutions of Georgia, Alabama, and Mississippi. In none of these slave-holding States did a Northern man have influence. The few instances of delegates who were natives of free States are instances of Northern men with Southern sentiments. Northern men who became members of Southern conventions usually had adopted Southern sentiments, just as Southern men who became members of Northern conventions had adopted Northern sentiments. The character of the border State conventions is shown in the history of Kentucky. Southern influence was paramount. Kentucky and Tennessee responded to Virginia and the Carolinas, and in turn Missouri responded to Kentucky. The admission of Missouri as a slave-holding commonwealth, a civil exception to the Compromise of 1820, is sufficient evidence of the nature of the influence that ruled the Missouri constitution of that year. But Missouri was the last border State. Its neighbor on the west, Kansas, at the centre of the Union, destined to become the early battle-ground in the concluding struggle between slavery and freedom, was also destined to record the paramount influence of the North.

In every constitutional convention held between

1800 and 1850 in the North there were a few delegates of foreign birth. Louisiana, having the largest foreign-born population of any Southern State, was the only slave-holding State in which persons of foreign birth exercised influence in public affairs and against slavery. This was conspicuous in the Louisiana convention of 1845.* In both North and South during this period the base of population was Teutonic. As yet foreign immigration had not affected public sentiment so as to change it perceptibly from its native character. In 1850 less than one-tenth of the population was foreign born.† Records of immigration to this country previous to 1820 are too imperfect to warrant generalization. From that time until 1850 less than two and a half million aliens arrived (2,456,715). These were chiefly from the United Kingdom, from which, during these thirty years, there came less than one million and a half (1,406,757); and of these a little more than one million were from Ireland (1,038,824), less than sixty thousand from England and Wales (58,374), and less than ten thousand from Scotland (9291). Nearly six hundred thousand came from Germany (593,841); less than fifty thousand from the British Provinces (47,624). But fourteen thousand came from Norway and Sweden (14,105). France sent one hundred and twenty thousand (121,364). From Switzerland came nearly thirteen thousand

* See Vol. i., Chaps. xiv., xv.

† In 1850 the native-born population was 20,947,274 (90.32 per cent.); the foreign-born, 2,244,602 (9.68 per cent.).

(12,691). From the Netherlands, from Denmark, from Russia and Poland, from the Chinese countries, which since 1850 have sent an increasing number of immigrants,* and from other countries, chiefly the West Indies (128,892), there came the remainder—too few to modify our civil institutions. The great migration from Austria-Hungary did not begin until after 1860. The immigrants who came to this country before 1850 settled almost entirely in the North, the exception being the settlement of some French immigrants in Louisiana.

The distribution of immigrants during the period but slightly affected local institutions. The English and Scotch were distributed quite uniformly throughout the North; the Irish located chiefly in the seaboard cities from Philadelphia to Portland, and in the towns in the interior. The Germans settled for the most part north of the Ohio and west of Pittsburgh, although many of them located along the highways of commerce from Albany to Chicago. The French, as a rule, settled in cities. The immigrants from other nations joined the mass of unskilled laborers, and settled in the larger cities and towns. At the close of the first half of the nineteenth century the foreign-born population of the country was not sufficient in numbers to cause any marked change in the organization of local government, or to influence constitutional conventions to introduce provisions in the supreme law affecting the status of persons

* Netherlands, 10,731; Denmark, 1766; Russia, 1393; China, 43.

of foreign birth. To this, however, there is one exception of great moment—the extension of the suffrage. By the modification of suffrage qualifications persons of foreign birth were enabled in some States to vote as soon as they had declared their intention to become citizens.

In 1790 there were six cities in the United States having more than eight thousand population; by 1850 there were eighty-five—the urban population increasing in the mean time from one hundred and thirty-one thousand (131,472) to two million eight hundred and ninety-seven thousand (2,897,586), or from less than three and a half (3.35) to nearly twelve and a half (12.49) per cent. of the population. Not till after 1850 was there a city in this country with a population of one million.

Other determining elements in the government of the commonwealths are the character education, and profession of the men who make their constitutions and laws. In the conventions the nativity of whose delegates has been given, there were one laborer, one innkeeper, one banker, one author, one lumberman, one naval officer, two geologists, three civil engineers, four manufacturers, six surveyors, six editors, nine teachers, fourteen ministers, forty-six merchants, forty-eight mechanics, fifty-two physicians, two hundred and thirty-seven farmers, and two hundred and fifty-nine lawyers.* Ninety-four had served in Congress. Very few of them had received more than an ele-

* See Vol. ii., p. 184 (Michigan); p. 377, note (California); p. 480, note (New Hampshire).

mentary education. Among the nearly three hundred members of the constitutional convention of Maine were twenty-three college graduates—one from Williams, one from Brown, nine from Dartmouth, and twelve from Harvard.

In no constitutional convention, down to 1850, was there a person of the African race. Although slavery and the status of free persons of color were the subjects of ceaseless discussion, in none did a black man participate. Government in America was solely the white man's government. Nor during this period did women participate in civil affairs. It was not the day of the new man or the new woman. Vital changes in civil structure and functions were going on. Slavery extension and the tariff divided the commonwealths. The joint resolution of one State was answered by the joint resolution of another,* and every year the sections were more widely separating — the North favoring a tariff and slavery restrictions, the South favoring free trade and slavery extension. While Clay was compromising, Calhoun planning, and Webster apologizing, an undercurrent of disunion was sweeping them off their feet. The national sentiment was obscure and feeble. It had never been fully aroused since 1776. The second war with England did not test the strength of the Union; the war with Mexico was felt at the time to be chiefly an affair of the South for the extension of slavery.

* See Vol. i., pp. 337–341, notes.

Soon after the middle of the half-century occurred the great debate between Webster and Hayne. It set the country to thinking. Never before had the issue been defined in so clear, so masterly a style. North and South spoke, and then their policies were defined. The debate was on legal propositions, not on industrial and economic conditions. The form and nature of the proposition showed Webster to advantage. Before the half-century closed he turned his back on his own teachings. His later action never equalled the promise of his greatest speech.

But our mind is drawn to the West. There are the new things—the people, youth, hope, and opportunity. There, amid much that seems crude, is more that proves remedial. Government there seems closer to the people than in the East. Posterity is considered; the fathers plan for the children; the State plans for all. The East may hold the great offices, but the West has men in training. The statesmen of the future are briefless lawyers in small Western towns. From the East the sceptre of power is passing to the West. There, seven Presidents are in training. The boys of the Mississippi Valley are soon to write the meaning of nationality with sword and bayonet.

It was a half-century of improvement, of increase of domestic comforts, of more humane treatment of the insane, the deaf, the dumb, the blind, the criminal classes. Legislation in restraint of crime, too long vindictive in its purposes, was becoming remedial. Legislatures were compelled

to provide educational opportunities for the poor. Slavery was losing its grasp; freedom was pervading the Territories and overspreading the States. Public sentiment, conscience-stricken, was turning helpfully towards the fugitive slave and the free negro, but it was in defiance of custom, laws, and constitutions.

Seventy-five years had passed since the great Declaration. They were years of hopeful effort to realize its principles.

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